Supreme Court, U.S.
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No.

IN THE
SUPREME COURT of the UNITED STATES

FRANKIE WHITE and LEON WARNER, Individually and on Behalf of All Others Similarly Situated,
Petitioners

vs.

THE COCA COLA COMPANY,
Respondent

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

Petition for WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether an employer has a conflict of interest when it both funds a welfare plan and has discretionary authority to interpret the plan if the employer periodically funds an irrevocable trust and funding is optional (not fixed as to amount or time of payment), or when the employer retains liability (if the trust has insufficient assets)?

II. In interpreting welfare plan's ambiguous language, do administrators act unreasonably by ignoring choice of law provisions?

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6, the undersigned Counsel of Record certifies that the following listed persons, parent companies, subsidiaries, and affiliates have an interest in the outcome of this case:

A) Behrman, Kenneth, Attorney for Petitioners.

B) The Coca-Cola Company (KO): Respondent. The Coca-Cola Company has hundreds of domestic and foreign consolidated subsidiaries. All of the consolidated subsidiaries are wholly owned and none are publicly traded.

C) The Long Term Disability Income Plan of the Coca-Cola Company.

D) Honorable Orinda D. Evans, United States District Court Judge.

E) Rocker, Joseph; Shuler, Darren and Tetrick, David (King & Spalding, LLP, Attorneys for Respondent).

F) Warner, Leon and White, Frank, Petitioners

G) The Honorable Stanley F. Birch, Jr., Charles R. Wilson and William H. Pryor, Jr. 11th Circuit Court of Appeals

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The opinion of the United States Court of Appeals for the Eleventh Circuit is reported at 542 F.3d 848 (11th Cir., 2008). The opinion of the United States District Court for the Northern District of Georgia is reported at 514 F. Supp. 2d 1353 (ND Ga., 2007).

STATEMENT OF JURISDICTION

The decision of the United States Court of Appeals for the Eleventh Circuit, affirming the decision of the district's court's order, was handed down on September 10, 2008. A timely petition for rehearing was denied on November 7, 2008. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT PROVISIONS INVOLVED

The Employee Retirement Income Security Act of 1974 ("ERISA") permits a person denied benefits under an employee benefit plan to challenge that denial in federal court. 88 Stat. 829, as amended, 29 U.S.C. § 1001 *et seq.*; see § 1132(a)(1)(B).

STATEMENT

Coca-Cola is the Sponsor and Administrator of the Long Term Disability Plan of The Coca-Cola Company ("Plan"). Pursuant to the Plan document, Coca-Cola delegated certain of its powers as plan

administrator to the Long Term Disability Income Plan Committee, which was dissolved effective January 1, 2003, and replaced by the Coca-Cola Company Benefits Committee ("Committee"). The Plan grants the Committee the authority to amend the plan as well as exclusive responsibility and final discretionary authority "to construe the Plan and decide all questions arising under the Plan." The Plan language also states that it is "to be construed in accordance with the laws of the State of Georgia, except to the extent such laws are preempted by ERISA and the Code."

The Plan is a self-funded, non-contributory welfare benefit plan and is funded through a tax-exempt trust organized as a Voluntary Beneficiary Association ("VEBA") trust under the Internal Revenue Code ("IRC").[1] Since the Plan is self-funded, Coca-Cola retains the liability for all long term disability claims incurred prior to January 1, 2003.[2] The Committee has complete discretion in determining when and how much to contribute to the trust.[3] In 2003, 2004 and 2006, no funds were

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[1] Unlike pension plans, there is no concern with welfare plan's funding, participation and vesting. D.O.L. Reg. § 2510.3-2[a].

[2] Claims starting after January 1, 2003 are payable through insurance by Liberty Life Assurance Company of Boston.

[3] The Plan's actuary makes recommendations concerning reserves representing the present value of long term disability payments to plan participants; however, the calculations reflect an offset for social security disability insurance.

contributed to the trust. In 2005, $5,000,000.00 was contributed to the trust. The trust is irrevocable unless the amount of contributions exceeds IRC's regulations. The trustee of the VEBA remits funds to the third party administrator ("TPA") on a monthly basis to reimburse the TPA for payment of long term disability claims incurred under the Plan.

The parties disagreed over the interpretation of Section 4.2 (a) of the Plan which states that the "offset for other disability benefits will not serve to reduce the Disability Benefit under this Plan to an amount less than 60 percent of the Participant's Average Compensation." While Petitioners believed the above language required a floor of 60%, the Committee, after seeking outside counsel's opinion, determined the above section conflicted with other provisions of the plan rendering the plan ambiguous. The Committee reviewed the summary plan description (which did not track the language of the Plan) and their own historical policies of using social security disability insurance ("SSDI") as an offset and believed the plan did not require a 60% floor. Subsequent to petitioners being approved for SSDI, respondent utilized the offset provision and recoupment provision which effectively permitted respondent to stop paying benefits to petitioners.

Petitioners brought suit contesting the plan administrator's decision to offset petitioners' receipt of SSDI, which permitted the long term disability benefits to fall below the 60% figure. The district court and the 11th Circuit determined the pertinent language of the plan was ambiguous and that the

Committee's decision was wrong under the principle of *contra proferentum*; however, in the final analysis, the court deferred to the Committee's reasonable but wrong decision. The district court and 11th Circuit also determined a conflict of interest did not exist as Coca-Cola periodically contributed to an irrevocable trust fund. In addition, the district court and 11th Circuit determined the choice of law language in the Plan was irrelevant.

REASONS FOR ALLOWANCE OF WRIT

I. Conflict of Interest

In *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101 (1989), this Court set out four principles as to the appropriate standard of judicial review under § 1132(a)(1)(B): (1) A court should be "guided by principles of trust law," analogizing a plan administrator to a trustee and considering a benefit determination a fiduciary act; (2) trust law principles required *de novo* review unless a benefit plan provides otherwise; (3) where the plan so provides, by granting the "administrator or fiduciary discretionary authority to determine eligibility for benefits or to construe the plan's terms," "a deferential standard of review is appropriate;" and (4) if the administrator or fiduciary having discretion "is operating under a conflict of interest, that conflict must be weighed as a 'factor in determining whether there is an abuse of discretion.'" *id.*, at 115

Recently, this Court in *Metropolitan Life Ins.*

Co. v. Glenn, __, U.S. ___, 128 S. Ct. 2343 (2008) indicated there is a conflict of interest when a plan administrator both funds the plan and evaluates the claims. "In such a circumstance, every dollar provided in benefits is a dollar spent by...the employer; and every dollar saved...is a dollar in [t]he employer's pocket."

As to the first question presented for review, the Appellate Circuits have three different opinions concerning periodic funding to an irrevocable trust.

The 11th Circuit states periodic contributions to an irrevocable trust eliminates a conflict of interest. *Gilley v. Monsanto*, 490 F.3d 848 (11th Cir., 2007). The 4th Circuit is in agreement with the 11th Circuit. *DeNobel v. Vitro*, 885 F.2d 1180 (4th Cir., 1980).

The 3rd Circuit indicates that even if there is an irrevocable trust, if the funding is not fixed or is not actuarially grounded, there is a conflict of interest. *Vitale v. Latrobe*, 420 F. 3d 278 (3rd Cir., 2005).[4] In accord, see *Carpenter v. Proctor & Gamble Disability Benefit Plan*, (3:CV-03-0399, 2006 WL 860060 (M.D. Pa. Mar. 31, 2006) aff'd 229 Fed. Appx. 10 (3rd Cir., 2007).

In *Burke v. Pitney Bowes*, 544 F. 3d 1016 (9th Cir., 2008), the court stated "[i]n light of *Met Life v. Glenn*, we disagree with those circuits [3rd, 4th and

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[4] Justice Samuel A. Alito, Jr. was a member of this panel.

11th] and hold that even when a plan's benefits are paid out of a trust, a structural conflict of interest exists that must be considered as a factor in determining whether there was an abuse of discretion." "An [employer] still has an incentive to keep claims' experience under the Plan as low as possible - the less the Trust pays out as benefits, the less the [employer] will ultimately need to contribute to the Trust to maintain its solvency." Also, a lower court in the 5th Circuit subsequent to *Metropolitan v. Glenn*, departing from possible prior 5th Circuit rulings, indicated "periodic contributions to an irrevocable trust is a conflict of interest as the [employer] may be more interested in keeping the amount of its irrevocable contributions low than in ensuring accurate claims processing." *Holland v. Retirement Plan of Int'l Paper Co.*, WD La. 05-1095, 2008 WL 4163089, September 4, 2008.

As can be seen by the above cases, there is considerable disagreement concerning whether a conflict of interest exists if an employer periodically contributes an amount to an irrevocable trust, especially when said amount is not fixed as to amount or time. In addition, in the case at bar, there is a question concerning whether the fund may or may not be actuarially grounded as one of the actuarial assumptions was based on an offset of SSDI - which is the very issue challenged by petitioners. Finally, another factor weighing in favor of a conflict of interest is that respondent remains liable for benefits if the trust fund is insufficient.

II. Choice of Law Concerning Ambiguous Plan Language

ERISA generally excludes any effort by states to regulate ERISA matters. *Shaw v. Delta Airlines, Inc.*, 463 U.S. 85 (1983). Some circuits have indicated parties may not contract to choose state law as the governing law of an ERISA governed benefit plan. *Prudential Ins. Co. v. Doe*, 140 F. 3d 785 (8th Cir., 1998) and *Morton v. Smith*, 91 F.3d 867 (7th Cir., 1996). The 9th Circuit and sometimes the 11th Circuit disagree with the 7th and 8th Circuit.

In *Buce v. Allianz Life Insurance Company*, 247 F.3d 1133 (11th Cir., 2001), the insurer had discretionary authority to interpret the plan provisions but there was a choice of law provision in the plan. The *Buce* Court noted ERISA's preemptive authority sweeps broadly to preclude the application of provisions of state law, statutory or decisional, that would undercut the uniform implementation of ERISA's text or its attendant case law; however, where a choice of law is made by an ERISA contract, it should be followed, if not unreasonable or fundamentally unfair. In accord, *Wang Laboratories, Inc. v. Kagan*, 990 F.2d 1126, 1128-29 (9th Cir., 1993).

Although presented with the above argument, the 11th Circuit in the case at bar did not address what happens under federal common law when there is a choice of law provision. Petitioners believe respondent's choice of Georgia law is not unreasonable or fundamentally unfair. Georgia law

simply sets forth a rule on contract construction that ambiguities are construed against the drafter of the agreement. O.C.G.A. § 13-2-2 (5) states "[i]f the construction is doubtful, that which goes most strongly against the party executing the instrument or undertaking the obligation is generally to be preferred." *Hospital Authority of Houston County v. Bohannon*, 272 Ga. App. 96 (2005). The principle of *contra proferentum* (ambiguities are construed against the drafter) are followed in all fifty states and the District of Columbia. *Kunin v. Benefit Trust Life Ins. Co.*, 910 F.2d 534 (1990). Petitioners believe that under the choice of law provision, an administrator's interpretation that ignored a choice of law provision (ambiguities are construed against the drafter) should be deemed unreasonable.

As Judge Barkett stated in her concurring opinion in *Buce* "[t]here is nothing in the goals and purposes of ERISA that extends to non-conflicting agreements to be bound by the decisional law of state courts in interpreting ambiguous terms in their contracts. Indeed, no Supreme Court case has addressed ERISA preemption in light of private agreements concerning state law."

CONCLUSION

For the above and foregoing reasons, Petitioners respectfully request the issuance of a writ of certiorari to the United States Court of Appeals for the Eleventh Circuit. In the alternative and pursuant to Rules of the Supreme Court Rule 16, petitioners request a summary disposition order

on the merits as to the first question presented for review. Petitioners request an order stating that when a plan's benefits are paid out of a trust that is periodically funded, a structural conflict of interest exists that must be considered as a factor in determining whether there was an abuse of discretion. The order should indicate the 11th Circuit's decision is reversed and that the case is remanded for a decision not inconsistent with this Court's order.

Respectfully submitted,

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APPENDIX A

United States Court of Appeals, Eleventh Circuit

Frankie WHITE, Leon Warner, Individually and On Behalf of All Others Similarly Situated, Plaintiffs-Appellants,
v.
The COCA-COLA COMPANY, Defendant-Appellee.

No. 07-13938.

D.C. Docket No. 06-01118-CV-ODE-1

[Filed Sept. 10, 2008]

Appeal from the United States District Court for the Northern District of Georgia.

Before BIRCH, WILSON and PRYOR, Circuit Judges.

PRYOR, Circuit Judge:

In this appeal we consider whether a plan administrator's reduction of benefits under a long-term-disability plan based on a participant's receipt of Social Security disability benefits is reasonable and entitled to deference. Frankie White and Leon Warner appeal the summary judgment against their complaints for benefits under the Coca-Cola Company Long Term Disability Income Plan, which is governed by the Employee Retirement Income Security Act of 1974. 29 U.S.C. §§ 1001-1461. White

and Warner contest the plan administrator's interpretation of both a provision that permits an offset for the receipt of other disability benefits and a provision that allows the plan to recoup overpayments of benefits. Because the interpretation of the offset provision by Coca-Cola is reasonable and entitled to deference and the interpretation of the recoupment provision by Coca-Cola is correct, we affirm the summary judgment in favor of Coca-Cola.

I. BACKGROUND

We divide our discussion of the background of this appeal in three parts. First, we discuss the terms of the plan. Second, we discuss White's and Warner's claims for benefits. Third, we discuss the procedural history.

A. The Plan

As the sponsor and administrator of the plan, Coca-Cola delegated its powers to The Coca-Cola Company Benefits Committee. The plan grants the committee exclusive responsibility and discretionary authority "to construe the Plan and decide all questions arising under the Plan," including the authority "to determine the eligibility of Participants to receive benefits and the amount of benefits to which any Participant may be entitled under the Plan." Although the plan permits the committee to delegate some of its powers to an administrative services provider, the committee retains the final authority to determine the eligibility of participants, the entitlement of participants to benefits, and all

issues arising under the plan.

For participants who were determined to be disabled under the plan before January 1, 2003, benefits are paid from a trust funded by periodic and irrevocable payments by Coca-Cola. Although Coca-Cola states that the claims of participants have never been paid from the general assets of Coca-Cola, two filings with the Internal Revenue Service, Form 5500 Annual Return/Report of Employee Benefit Plan for the years 2003 and 2004, state that claims were paid out of the trust and the general assets of Coca-Cola for those years. Coca-Cola filed an affidavit stating that these filings have scrivener's errors.

Under the plan, the default monthly benefit is ordinarily 60 percent of the participant's average compensation. The plan contains in section 4.2(a) an offset provision, which reduces the disability benefits for a participant who receives disability benefits from other sources:

> The monthly Disability Benefit payable from this Plan to the Participant who receives disability benefits from any source described in subsection (b) [including Social Security benefits] will be reduced as necessary so that the total of his monthly Disability Benefit from this Plan equals no more than the following amount:
>
> (1) 70 percent of his Average Compensation ... minus
>
> (2) the amount of his monthly disability

benefits payable from all other sources;

provided that the difference will not exceed 60 percent of his Average Compensation ...; and provided further that the offset for other disability benefits will not serve to reduce the Disability Benefit under this Plan to an amount less than 60 percent of the Participant's Average Compensation ....

The plan also states that benefits under the plan will cease if benefits from other sources "equal[ ] or exceed[ ] 70 percent of [the participant's] Average Compensation."

The summary plan description provides an example of the operation of the offset provision:

LTD payment example

Suppose your basic monthly pay for disability purposes is $3,000 and you do not receive benefits from other sources.

Here's how your LTD payment is figured:

$3,00 0 Basic monthly pay before disability
<u>x 60%</u> Maximum LTD pay replacement percentage
$1,80 0 Maximum monthly benefit from the LTD plan

If you begin receiving $750 in monthly

Social Security disability payments, your LTD benefits will be reduced as follows:

$3,000	Basic monthly pay before disability
x 70%	Maximum pay replacement percentage from all sources
$2,100	Total amount of your pay to be replaced from all sources
-[$]750	Monthly Social Security disability payment
$1,350	Actual monthly benefit from the LTD plan

As the above example shows, the LTD Plan works with your Social Security disability payments to bring your monthly income to 70% of your basic monthly pay.

The summary plan description also restates that benefits cease if benefits from other sources equal or exceed 70 percent of the participant's average compensation.

The plan also contains a provision for the recoupment of any overpayment of benefits. Section 4.2(d) of the plan states, "If the Participant receives a retroactive payment of a disability benefit described in Subsection (b), the benefit will be considered to have been paid throughout the period for which it was payable." Section 4.2(e), which is the recoupment provision, states, "Any overpayment of Disability Benefits arising under Subsection ... (d)

will be deducted from the Participant's future payments [from the plan]." The summary plan description restates these provisions.

B. White's and Warner's Claims for Benefits

White became disabled in 1999 and received long-term disability benefits under the plan from August 1999 to July 2004. White received $1,720.15 a month, which was 60 percent of his average compensation. On July 31, 2004, the administrative services provider, Liberty Life Assurance Company of Boston, terminated White's disability benefits. White appealed, and the committee reinstated White's benefits in November 2005 retroactive to July 30, 2004.

In July 2005, the Social Security Administration awarded White disability benefits in the amount of $1,442.10 a month retroactive to November 2001. The Administration awarded White a lump-sum payment of $38,124.90 in retroactive benefits. White informed Coca-Cola of his award of Social Security benefits in August 2005.

When Liberty Life resumed making payments to White, it applied both the offset provision and the recoupment provision. Liberty Life reduced White's payments to 70 percent of his average compensation less his monthly Social Security benefits for a total monthly payment of $564.85. Liberty Life calculated that White had been overpaid $32,824.90 and reduced his monthly benefits under the plan by $466.84 a month for approximately 60 months to

recover the overpayments. Liberty Life did not inform White that he could file an administrative appeal to challenge the reduction of his benefits.

White appealed the application of the offset and recoupment provisions to the committee in February 2006. White argued that the last proviso clause of the offset provision creates a "60 percent floor" for his benefits and prohibits an offset to account for his receipt of Social Security benefits. White also argued that, even if the plan permits the offset of his future benefits to account for his Social Security benefits, the plan and ERISA prohibit the recovery of an overpayment of his past benefits. White attached a copy of a judicial opinion, *Oliver v. Coca-Cola Co.*, 397 F.Supp.2d 1327 (N.D.Ala.2005), in support of his appeal.

The committee retained outside counsel, Patrick DiCarlo, to evaluate White's claims and prepare a legal opinion regarding the offset and recoupment provisions. DiCarlo concluded that, because the proviso clause was inconsistent with other terms of the plan, the offset provision was ambiguous. DiCarlo concluded that the committee could interpret the plan to permit an offset below 60 percent of a participant's average compensation to account for benefits from other sources and recover an overpayment based on a retroactive award of Social Security benefits. DiCarlo also concluded that Coca-Cola was not bound by the decision of the district court in *Oliver*. The committee adopted DiCarlo's interpretation of the plan and unanimously voted to deny White's claims for

additional benefits. DiCarlo sent a letter to White that explained the final decision of the committee.

Warner became disabled and, in March 2000, was approved for disability benefits of $1,931.62 a month, which was 60 percent of his average compensation. On October 15, 2002, the plan administrator, ING, informed Warner that, because he received Social Security disability benefits of $1,474 a month beginning in October 2000, ING would apply the offset and recoupment provisions to his benefits. ING determined that Warner was overpaid $26,471.70 in benefits and reduced his payments by $779.56 a month for approximately 23 months. ING never informed Warner of his ability to file an administrative appeal, and Warner did not appeal the reduction of his benefits.

C. Procedural History

White and Warner filed a complaint against Coca-Cola regarding the reduction of their benefits. The district court granted summary judgment in favor of Coca-Cola and denied the motion for partial summary judgment filed by White and Warner. The district court concluded that the interpretation of the offset provision by Coca-Cola is "*de novo* wrong," but reasonable and entitled to deference. The district court also concluded that the interpretation of the recoupment provision by Coca-Cola is "*de novo* right." The district court denied as unnecessary the motion to compel discovery and denied as moot their motion for class certification.

II. STANDARDS OF REVIEW

We review a summary judgment *de novo*. *Cagle v. Bruner*, 112 F.3d 1510, 1514 (11th Cir.1997). We review a denial of discovery for abuse of discretion. *Jackson v. Cintas Corp.*, 425 F.3d 1313, 1316 (11th Cir.2005). We review a denial of class certification for abuse of discretion. *Hines v. Widnall*, 334 F.3d 1253, 1255 (11th Cir.2003).

III. DISCUSSION

The district court used the framework that we established in *Williams v. BellSouth Telecommunications, Inc.*, 373 F.3d 1132, 1137-38 (11th Cir.2004), which provides a six-step process "for use in judicially reviewing virtually *all* ERISA-plan benefit denials":

> (1) Apply the *de novo* standard to determine whether the claim administrator's benefits-denial decision is "wrong" (*i.e.*, the court disagrees with the administrator's decision); if it is not, then end the inquiry and affirm the decision.
>
> (2) If the administrator's decision in fact is "*de novo* wrong," then determine whether he was vested with discretion in reviewing claims; if not, end judicial inquiry and reverse the decision.
>
> (3) If the administrator's decision is "*de novo* wrong" and he was vested with discretion in reviewing claims, then determine whether "reasonable" grounds supported it (hence, review

his decision under the more deferential arbitrary and capricious standard).

(4) If no reasonable grounds exist, then end the inquiry and reverse the administrator's decision; if reasonable grounds do exist, then determine if he operated under a conflict of interest.

(5) If there is no conflict, then end the inquiry and affirm the decision.

(6) If there is a conflict of interest, then apply heightened arbitrary and capricious review to the decision to affirm or deny it. Id. (footnotes omitted).

Recently, in *Metropolitan Life Insurance Co. v. Glenn*, the Supreme Court cast doubt on the sixth step of this procedure. --- U.S. ----, 128 S.Ct. 2343, 2350-51, 171 L.Ed.2d 299 (2008). After the Court determined that the administrator of an ERISA plan operated under a conflict, it considered " 'how' [a] conflict ... should 'be taken into account on judicial review of a discretionary benefit determination.' " *Id.* at 2350 (quoting *MetLife v. Glenn*, --- U.S. ----, 128 S.Ct. 1117, 169 L.Ed.2d 845 (2008) (mem.)). The Court concluded "that a conflict should 'be weighed as a factor in determining whether there is an abuse of discretion.' " *Id.* (quoting *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 115, 109 S.Ct. 948, 957, 103 L.Ed.2d 80 (1989) (internal quotation marks omitted)). The Court explained that the consideration of a conflict as a factor did not require "a change in the *standard* of review" and criticized

"special burden-of-proof rules, or other special procedural or evidentiary rules, focused narrowly upon the evaluator/payor conflict" that circuit courts had developed. Id. at 2351. The Court stated that "[b]enefits decisions" are too numerous in nature "to come up with a one-size-fits-all procedural system that is likely to promote fair and accurate review. Indeed, special procedural rules would create further complexity, adding time and expense to a process that may already be too costly for many of those who seek redress." Id. Although *Glenn* affects the sixth step of *Williams*, *Glenn* does not alter our analysis unless Coca-Cola operated under a conflict of interest.

We divide our discussion of the merits of this controversy in two parts. First, we address whether Coca-Cola reasonably interpreted the offset provision. Second, we discuss whether Coca-Cola correctly interpreted the recoupment provision.

White and Warner also raise issues about litigation procedures that we need not address. Because the district court was correct to grant summary judgment in favor of Coca-Cola, the district court did not abuse its discretion in denying the motions of White and Warner for discovery and class certification. The resolution of the merits of this controversy obviates any issue about these procedures.

A. Coca-Cola Reasonably Interpreted the Offset Provision.

Our discussion of whether Coca-Cola reasonably interpreted the plan is divided in four parts. First, we address why the proviso clause of section 4.2(a) is ambiguous and the interpretation by Coca-Cola of that provision is wrong. Second, we address the discretion of Coca-Cola to interpret the plan. Third, we explain why the reconciliation by Coca-Cola of the conflicting provisions in the plan is reasonable. Fourth, we address whether Coca-Cola operated under a conflict of interest when it interpreted the plan.

1. The Interpretation by Coca-Cola of the Ambiguous Offset Provision is Wrong.

White and Warner argue that the interpretation of the offset provision by Coca Cola is *de novo* wrong because the "only plausible interpretation of Section 4.2 [of the plan] would be to place a 60% cap and a 60% floor" on the benefits that a participant receives. Coca-Cola responds that its interpretation is reasonable because the proviso clause of the offset provision conflicts with other provisions in the plan. Coca-Cola concedes that the district court correctly concluded that the proviso clause creates an ambiguity that the district court was permitted to construe against Coca-Cola as the drafter of the document.

We agree with Coca-Cola that the proviso clause conflicts with other provisions of the plan. Section 4.1(b) of the plan places a cap of 60 percent of a participant's average compensation on the benefits a participant may receive under the plan: "no

Participant can receive a monthly benefit from this Plan in excess of 60 percent of his Average Compensation." The proviso clause then sets a 60 percent floor for benefits under the plan: "[T]he offset for other disability benefits will not serve to reduce the Disability Benefit under this Plan to an amount less than 60 percent of the Participant's Average Compensation." But it makes no sense to have both a 60 percent cap and a 60 percent floor when section 4.2(a) otherwise states that disability benefits cannot exceed 70 percent of the participant's average compensation. The 60 percent floor in the proviso clause also conflicts with section 3.4, which refers to the reduction of a participant's benefits below 60 percent of his average compensation if he receives disability benefits from other sources. *Cf.* *Stewart v. KHD Deutz of Am., Corp.*, 980 F.2d 698, 703 (11th Cir.1993) (identifying incompatible provisions of a benefits plan).

The problem for Coca-Cola is that this ambiguity favors White and Warner. Ambiguities in ERISA plans are construed against the drafter of the document, and a claimant's reasonable interpretation is viewed as correct. *Lee v. Blue Cross/Blue Shield of Ala.*, 10 F.3d 1547, 1551 (11th Cir.1994). Because the claimants' interpretation of a 60 percent floor is a reasonable reading of the proviso clause, the interpretation by Coca-Cola is *de novo* wrong. We agree with that ruling by the district court.

2. The Plan Vests the Committee with Discretion.

White and Warner concede that the plan grants the Benefits Committee complete and final discretionary authority to construe the plan and decide all questions arising under the plan, but they argue that we should not recognize that discretion for several reasons. Their arguments fail. We address each in turn.

White and Warner argue that we should not recognize the discretion of the committee to interpret the plan because the third-party administrator did not give them notice of the right to appeal the application of the offset and recoupment provisions to their benefits. We disagree. There is evidence in the record that White and Warner had notice of their right to appeal the decisions of the third-party administrators: the procedure for administrative appeals is outlined in every summary plan description issued by Coca-Cola during the relevant time period. White also filed an administrative appeal of the decision.

White and Warner argue that the failure of the third-party administrator to notify them of their right to appeal violates federal regulations that govern notices sent to plan participants, *see* 29 C.F.R. § 2560.503-1(f)-(h), and they cite *Torres v. Pittston Co.*, 346 F.3d 1324, 1333 n. 11 (11th Cir.2003), for the proposition that this failure permits courts to review the decisions of the administrator without deference. *Torres* creates no such permission. In *Torres*, we addressed whether a "deemed denial" of benefits under a plan receives less deference on judicial review than does a denial

that does not occur by operation of ERISA regulations. We explained that the Labor Department "has taken the position that" failure to comply with minimum procedural safeguards permits courts to review the decisions of an administrator without deference. Id. at n. 11. We declined to adopt that broad position. We instead recognized that some courts review deemed denials *de novo* because they are not the result of plan administrators' discretion, and other courts "have held that the fact that the denial occurs by operation of ERISA regulations does not alter the otherwise-applicable standard of review." *Id.* at 1332-33. As the district court observed correctly, this division of authorities was limited to administrative failures to exercise discretion. This appeal does not involve an administrative failure to exercise discretion, and Torres does not, in any event, require us to alter our standard of review.

White argues that the committee prejudged his appeal because it argued against his position in *Oliver* and *Byars v. Coca-Cola Co.*, No. 1:01-CV-3124-TWT, 2006 WL 2523095 (N.D.Ga. Aug. 28, 2006), where the plaintiffs advocated a 60 percent floor on benefits. White has not cited any authority to support his argument that a fiduciary's knowledge of how a disputed term was applied in collateral litigation renders that fiduciary incapable of conducting a full and fair review. As the district court concluded, the consultation of outside counsel by the committee mitigates any concerns about fairness and prejudgment. *See Adams v. Thiokol Corp.*, 231 F.3d 837, 845 (11th Cir.2000). Fairness

and prejudgment may be relevant to the determination whether the decision of the committee was arbitrary and capricious, but do not warrant a less-deferential standard of review.

White advocates a rule where an administrator cannot provide a plaintiff a full and fair review if the plaintiff is challenging a provision of a plan and the administrator previously was involved in a suit about the interpretation of that provision. This rule is unworkable. Administrators must constantly interpret plans, and an administrator occasionally will be sued by a participant who disagrees with the administrator's interpretation.

White argues that John Howland, a member of the committee who voted to deny White's appeal, has a conflict of interest because he had been involved in the initial determination to offset White's benefits. The record does not support this argument. The emails relied upon by White do not evidence that Howland was involved in the initial decision to apply the offset and recoupment provisions to White's benefits.

The plan gives the committee discretion "to decide all questions arising under the Plan." The arguments of White and Warner that we should strip the committee of this discretion fail. Because section 7.2(b) of the plan gives the committee discretion, we review the interpretation of the offset and recoupment provisions by the committee under the "deferential arbitrary and capricious standard." *Williams*, 373 F.3d at 1138.

3. The Interpretation of the Offset Provision by Coca-Cola is Reasonable.

"As long as a reasonable basis appears for [the] decision [of the Committee], it must be upheld as not being arbitrary or capricious, even if there is evidence that would support a contrary decision." *Jett v. Blue Cross & Blue Shield of Ala., Inc.*, 890 F.2d 1137, 1140 (11th Cir.1989). As we explained earlier, the proviso clause conflicts with several provisions of the plan, which creates an ambiguity. After the committee identified this ambiguity, it was permitted to consider extrinsic evidence to resolve it. *Thiokol*, 231 F.3d at 844; *see also* *Stewart*, 980 F.2d at 702.

The committee reasonably interpreted the proviso clause to make it consistent with the summary plan description, the past practices of Coca-Cola, and the other provisions of the plan. The summary plan description clearly explains the reduction of benefits if a participant receives benefits from other sources and provides an arithmetical example of the offset. The committee determined that it had been the established practice of Coca-Cola to permit an offset below 60 percent of a participant's average compensation. *See* *Thiokol*, 231 F.3d at 844 (fiduciary properly considered how a disputed plan provision had been interpreted in the past to resolve an ambiguity); *Carriers Container Council, Inc. v. Mobile S.S. Ass'n Inc.-Int'l Longshoreman's Ass'n*, 896 F.2d 1330, 1339 (11th Cir.1990). The committee retained and followed the advice of outside counsel

regarding both the offset and recoupment provisions. "There is no requirement that an administrator ... seek independent counsel in interpreting and administering an ERISA plan," but seeking counsel establishes the "evenhandedness of [the] decision-making process" because it contributes to "informed and knowledgeable decisions ... in interpreting the Plan." Thiokol, 231 F.3d at 845.

White and Warner argue that the interpretation of the offset provision by the committee ignores the *contra proferentem* doctrine in Georgia law, but this argument fails. "[W]hen a federal court construes an ERISA-regulated benefits plan, the federal common law of ERISA supersedes state law." *Buce v. Allianz Life Ins. Co.*, 247 F.3d 1133, 1142 (11th Cir.2001). We have rejected *contra proferentem* in ERISA appeals, except during the first step of the *Williams* analysis, because "[t]he 'reasonable interpretation' factor and the arbitrary and capricious standard of review would have little meaning if ambiguous language in an ERISA plan were construed against the [plan administrator]." *Cagle*, 112 F.3d at 1519. Because we agree with the district court that Coca-Cola reasonably interpreted the offset provision, we next consider whether the committee operated under a conflict of interest.

4. The Committee Did Not Operate Under a Conflict of Interest.

White and Warner argue that the committee operated under a conflict of interest, but we disagree. White and Warner argue that the

committee operated under a conflict of interest because the third-party administrator pays benefits to participants and is later reimbursed by the trust, but they cite no authority for this argument. The delegation of a ministerial task to the third-party administrator does not create a conflict because benefits are paid by the trust and Coca-Cola "incurs no immediate expense as a result of paying benefits." Gilley v. Monsanto Co., Inc., 490 F.3d 848, 856 (11th Cir.2007).

White and Warner contend that benefits are paid from the general assets of Coca-Cola and rely on two forms filed with the IRS in 2003 and 2004, which state that benefits were paid from both the trust and the general assets. Viewing this evidence in the light most favorable to White and Warner, the forms do not prove that benefits were paid from general assets in 2002 when the offset and recoupment provisions were applied to Warner, in 2005 when the provisions were applied to White, or in 2006 when White filed his appeal with the committee. White and Warner also argue that passages from several administrative information booklets, which accompany the summary plan descriptions each year, prove that benefits are paid from the general assets of Coca-Cola, but White and Warner misstate these passages, which state that general assets may be used to fund several benefits plans and that the "Long Term Disability Plan is funded through a trust to which the Company contributes."

The committee does not operate under a conflict of interest. "Our circuit law is clear that no conflict of

interest exists where benefits are paid from a trust that is funded through periodic contributions so that the provider incurs no immediate expense as a result of paying benefits." Id. at 856; *see also* *Buckley v. Metro. Life*, 115 F.3d 936, 939-40 (11th Cir.1997). Under the plan, a participant's benefits are paid by the third-party administrator, which is refunded by the trust. Coca-Cola makes periodic, nonreversionary payments to the trust.

B. Coca-Cola Correctly Interpreted the Recoupment Provision.

White and Warner next argue that the interpretation of the recoupment provision by the committee is *de novo* wrong and unreasonable. White and Warner contend that Coca-Cola cannot seek reimbursement of an overpayment of their benefits because Coca-Cola cannot establish that they were overpaid and the recoupment provision is unenforceable. We disagree.

The interpretation of the recoupment provision by the committee is *de novo* correct. The plain language of sections 4.2(d) and (e) of the plan permits the withholding of future benefits to recover any overpayment arising from a retroactive payment of benefits from outside sources. White and Warner offer no argument that this language is ambiguous.

White and Warner make four arguments about why the interpretation of the recoupment provision by the committee is erroneous, but these arguments fail. First, White and Warner argue that they were

not overpaid, but this argument is based on their interpretation of the offset provision, which is foreclosed by the reasonable interpretation of that provision by the committee. Second, White and Warner argue that Coca-Cola cannot seek a legal remedy under section 502(a)(3) of ERISA, which permits plan fiduciaries to seek only equitable relief. Although there are several decisions by the Supreme Court and our Circuit about what kind of relief is available to fiduciaries who sue beneficiaries under section 502(a)(3), *see, e.g.*, *Sereboff v. Mid Atl. Med. Servs., Inc.*, 547 U.S. 356, 126 S.Ct. 1869, 164 L.Ed.2d 612 (2006); *Popowski v. Parrott*, 461 F.3d 1367 (11th Cir.2006), these decisions are inapposite because Coca-Cola has not sought judicial relief. Third, White and Warner argue that Coca-Cola may not recover any overpayment from their Social Security benefits, which they allege are protected from claims under federal law, *Philpott v. Essex County Welfare Bd.*, 409 U.S. 413, 93 S.Ct. 590, 34 L.Ed.2d 608 (1973), but Coca-Cola is withholding future benefits under the plan. Fourth, White and Warner cite *Smith v. Life Insurance Co. of North America*, 466 F.Supp.2d 1275 (N.D.Ga.2006), for the proposition that ERISA precludes the enforcement of the recoupment provision, but that decision is inapposite. In *Smith*, the district court concluded, "Despite the [subrogation] language of the Plan, the federal common law make whole doctrine precludes [a plan administrator] from off-setting its monthly disability benefits" to account for a participant's tort recovery unless the participant has been "made whole." *Id.* at 1286. This appeal does not involve a tort recovery or the make whole doctrine.

IV. CONCLUSION

We *affirm* the summary judgment in favor of Coca-Cola.

AFFIRMED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

No. 1:06-CV-118-ODE

[Filed August 2, 2007]

FRANKIE WHITE and LEON WARNER,
individually and on behalf of all others similarly situated,
Plaintiffs

v.

THE COCA-COLA COMPANY,
Defendant

ORDER

ORINDA D. EVANS, District Judge.

This putative class action has been brought by individual Plaintiffs, Frankie White and Leon Warner, against The Coca-Cola Company ("Coca-Cola"). White and Warner seek to recover long term disability benefits under an employee welfare benefit plan, sponsored by their employer, Coca-Cola, and governed by the Employee Retirement Income Security Act of 1974 ("ERISA"). The case is presently before the Court on Plaintiff White's Motion for Partial Summary Judgment [Doc. 17], Defendant the Coca-Cola Company's Cross Motion for Summary Judgment on All of Plaintiffs' Claims [Doc. 20], Plaintiffs' Motion and Brief to Compel Discovery [Doc. 23], Plaintiffs' Motion and Brief in Support of Class Certification [Doc. 24], and Defendant the Coca-Cola Company's Motion for Leave to File Supplemental Motion for Summary Judgment on Plaintiff Leon Warner's Claims [Doc. 34].

For the following reasons, Plaintiff White's Motion for Partial Summary Judgment [Doc. 17] is DENIED, Defendant's Motion for Summary Judgment [Doc. 20] is GRANTED, Plaintiff's Motion to Compel [Doc. 23] is DENIED, Plaintiffs' Motion for Class Certification [Doc. 24] is DISMISSED AS MOOT, and Defendant's Motion for Leave [Doc. 34] is DISMISSED AS MOOT.

I. *Factual Background*

Unless otherwise noted, the following facts are undisputed.

A. *Operation of the Plan*

Coca-Cola is the Sponsor and Administrator of the Long Term Disability Plan of The Coca-Cola Company ("Plan"). Pursuant to the Plan document, Coca-Cola delegated certain of its powers as Plan Administrator to the Long Term Disability Income Plan Committee, which was dissolved effective January 1, 2003, and replaced by The Coca-Cola Company Benefits Committee ("Committee"). The Plan document grants the Committee exclusive responsibility and final discretionary authority "to construe the Plan and decide all questions arising under the Plan."[Plan Doc. § 7.2(b)(2)]. Specifically, the Committee is given the authority "to determine the eligibility of Participants to receive benefits and the amount of benefits to which any Participant may be entitled under the Plan."*Id.* at § 7.2(b)(3).

According to Coca-Cola, plan participants with Disability Dates prior to January 1, 2003 are paid from the Trust Forming a Part of the Coca-Cola Company Long Term Disability Income Plan ("Trust"), which is funded by periodic, irrevocable payments. Coca-Cola claims that these plan participants are not, and have never been, paid from Coca-Cola's general assets. The Trust qualifies as a Voluntary Employees' Beneficiary Association ("VEBA") under Internal Revenue Code § 501(c)(9). However, filings with the IRS from 2003 and 2004

reflect that funds for disability claims are also paid out of general assets.

Pursuant to the Plan, the default monthly benefit is equal to 60% of the participant's Average Compensation, which is defined by the Plan. The Plan provides an offset for participants who also receive Social Security disability insurance ("SSDI") benefits. Specifically, § 4.2 of the Plan document, entitled "Offset for Other Disability Benefits" ("Offset Provision") states that:

> The monthly Disability benefit payable from this Plan to the Participant who receives disability benefits from any source described in Subsection (b) [including Social Security disability benefits] will be reduced as necessary so that the total of his monthly Disability Benefit from this Plan equals no more than the following amount:
>
> > (1) 70 percent of his Average Compensation ...., minus
> > (2) the amount of his monthly disability benefits payable from all other sources;
>
> provided that the difference will not exceed 60 percent of his Average Compensation as limited by the $200,000 (indexed) limitation described in Section 1.4; and provided further that the offset for other disability benefits will not serve to reduce the Disability Benefit under this Plan to an amount less than 60 percent of the Participant's Average Compensation as limited.

[Plan Doc. § 4.2(a)]. The Summary Plan Description ("SPD") for the Plan provides the following example of the operation of the Offset Provision:

LTD payment example

Suppose your basic monthly pay for disability purposes is $3,000 and you do not receive benefits from other sources.

Here's how your LTD payment is figured:

$ 3, 000 Basic monthly pay before disability

x 60 %Maximum LTD pay replacement percentage

$ 1, 800 Maximum monthly benefit from the LTD plan. If you begin receiving a $750 in monthly Social Security disability payments, your LTD benefit will

be reduced as follows:

$ 3, 000 Basic monthly pay before disability

x 70 % Maximum pay replacement percentage from all sources

$ 2, 100 Total amount of your pay to be replaced by all sources

- [$] 750 Monthly Social Security disability payment

$ 1, 350 Actual monthly benefit from the LTD plan

As the above example shows, the LTD Plan works with Social Security disability payments to bring your monthly income to 70% of your basic monthly pay.

***

Since the LTD Plan

> benefit combined with other sources of LTD benefits cannot exceed 70% of your basic monthly earnings, the LTD plan benefit would be reduced as necessary.

[Long Term Disability Summary Plan Description FN1 at 4].

With respect to SSDI benefits, § 3.4(d) of the Plan document provides that disability payments from the Plan will cease if the SSDI benefits "equal[ ] or exceed[ ] 70 percent of [the Participant's] Average Compensation." The SPD states, in a subsection titled "When benefits stop," that "[i]f the income you receive from Social Security ... or other sources of disability benefits is equal to or more than 70% of your basic monthly earnings, payments from the ... [P]lan will end." [SPD at 7].

The Plan document states that, "[i]f the Participant receives a retroactive payment of a disability benefit..., the benefit will be considered to have been

FN1. All citations to the Summary Plan Description are to the 2005 version of the SPD. However, contrary to certain of Plaintiffs' Response to Coca-Cola's Statement of Undisputed Material Facts, all quoted language from the SPD appears in the 2005, 2001 and 1995 versions of the SPD [See Pl. Resp. to Undisputed Facts, at ¶¶ 20-21]. In other words, the relevant portions of the SPD have remained unchanged during all times at issue in this lawsuit. Only the page numbers have changed on occasion.

paid throughout the period for which it is payable." [Plan Doc. § 4.2(d)]. Furthermore, § 4.2(e) of the Plan ("Recoupment Provision") provides that, "[a]ny overpayment of Disability Benefits arising under Subsection ... (d) will be deducted from the Participant's future payments [from the Plan]." The SPD also addresses the issues of overpayment and retroactive benefits. First, "[i]f your LTD plan benefits are overpaid for any reason, you will be required to reimburse the third party administrator for the overpayment. Your benefits will be reduced or stopped until the overpayment is recouped." [SPD at 5]. Finally, the SPD states that, "[i]f any other benefits coordinated with LTD benefits are awarded retroactively, they will be treated as having been received by you during the entire time period for which such benefits were payable and any overpayment of any program benefits will be calculated accordingly." *Id.* at 14.

B. *Background on White's Claims*

White became disabled in 1999 and received long term disability benefits pursuant to the Plan from August 1999 through July 2004. White's benefits totaled $1720.15 per month, which equaled 60% of his Average Compensation. On July 31, 2004, Liberty Life Assurance Company of Boston ("Liberty Life"), the Plan's administrative services provider, terminated White's disability benefits. White disputed the termination of his benefits through the administrative appeals process and, in November 2005, White's benefits were reinstated retroactive to

July 30, 2004 by the Committee.

In July 2005, while his administrative appeal was ongoing, White was approved for SSDI benefits by the Social Security Administration in an amount of \$1442.10 per month, retroactive to November 2001. In order to pay his retroactive benefits, White was given a lump sum award of \$38,124.90 in SSDI benefits. Coca-Cola learned of the Social Security benefits in August 2005.

Upon resuming monthly benefit payments to White, Liberty Life applied the Offset Provision and reduced his payments to 70% of his Average Compensation (\$2,006.85) minus his monthly SSDI benefits (\$1442.00). Accordingly, White's monthly benefit from the plan was \$564.85. Liberty Life also applied the Recoupment Provision to recover what it claimed were overpayments of Plan benefits for the period of time during which White received 60% of his Average Compensation, instead of 70% of Average Compensation minus the retroactive SSDI benefits. These alleged overpayments equaled \$1,155.30 per month, for a total of \$38,124.90 over the 33-month period covered by the retroactive SSDI award. The amount was reduced by \$5,300 in attorney's fees that White was awarded in his SSDI letter, leaving a total alleged overpayment of \$32,824.90 in Plan benefits. Liberty Life began recovering the overpayment by reducing White's monthly benefits by approximately \$500 per month, and planned to do so for approximately 60 months.

White submitted a written appeal of the application

of the Offset Provision and the Recoupment Provision directly to the Committee. On appeal, White argued that the last clause ("Proviso Clause") at the end of Offset Provision, which states, "provided further that the offset for other disability benefits will not serve to reduce the Disability Benefit under this Plan to an amount less than 60 percent of the Participant's Average Compensation as limited," creates a "60% floor" on Plan benefits and prohibits offsetting benefits to account for the receipt of SSDI benefits. White also argued that even if the Plan did permit offset of future benefits based on receipt of SSDI benefits, recoupment of overpayment of past Plan benefits by reducing future benefits for a limited time was prohibited.

The Committee retained outside counsel, Patrick DiCarlo, to evaluate White's claims and prepare a legal opinion regarding the Plan provisions at issue. DiCarlo delivered his analysis and opinion ("DiCarlo Report") to the Committee on April 12, 2006. The DiCarlo Report determined that because of the inconsistency created by the Proviso Clause, the Offset Provision was ambiguous on its face. Based on its analysis, the DiCarlo Report stated that the Committee could interpret the Plan as permitting. offset below 60% of Average Compensation and recovery of overpayment based on a retroactive SSDI benefit award. The Committee adopted the DiCarlo Report's interpretation of the Plan and unanimously voted to deny White's claim for additional benefits. DiCarlo drafted a letter explaining the Committee's final determination and reasoning, and the letter was issued to White on April 28, 2006. The instant

lawsuit was filed on May 10, 2006.

C. *Background on Warner's Claims*

Warner was initially approved for disability benefits in March 2000. On October 15, 2002 Warner was informed that based on Social Security benefits that began in October 2000, Coca-Cola was retroactively applying the offset provision and seeking return of overpayment. ING, the plan administrator at the time, applied the same formula to Warner's claims as was applied to White's claims and determined that Warner was overpaid $26,471.70. Warner's benefits were reduced by approximately $500 per month, and according to Warner, the full amount has been recovered. Unlike White, Warner did not file an administrative claim with Coca-Cola regarding the application of the offset provision.

Coca-Cola moved to dismiss Warner's claims as barred by the explicit time limitations of the Plan [Doc. 6]. In an Order dated March 30, 2007, the Court denied Coca-Cola's Motion to dismiss because there was no evidence that the documents containing the time limitation at issue were ever provided to Warner in compliance with the regulations governing changes to ERISA plans. [Doc. 32].

II. *Standard for Summary Judgment*

The Court will grant summary judgment when "there is no genuine issue as to any material fact ... and the moving party is entitled to judgment as a

matter of law." Fed.R.Civ.P. 56(c). An issue is not genuine if it is unsupported by evidence or is created by evidence that is "merely colorable" or "not significantly probative." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). Similarly, a fact is not material unless it is identified by the controlling substantive law as an essential element of the non-moving party's case. *Id.* at 248, 106 S.Ct. 2505.

The moving party "always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,' which it believes demonstrate the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986) (quoting Fed.R.Civ.P. 56(c)). When the non-moving party bears the burden of proof at trial, the moving party's initial burden is to negate an essential element of the non-moving party's case or to show that there is no evidence to prove a fact necessary to the non-moving party's case. *See* *Clark v. Coats & Clark, Inc.*, 929 F.2d 604, 606-08 (11th Cir.1991). When the moving party bears the burden of proof at trial, it "must demonstrate that 'on all the essential elements of its case on which it bears the burden of proof at trial, no reasonable jury could find for the non-moving party.' " *Irby v. Bittick*, 44 F.3d 949, 953 (11th Cir.1995) (quoting *United States v. Four Parcels of Real Prop.*, 941 F.2d 1428, 1438 (11th Cir.1991)).

Only after the moving party meets this initial burden does any obligation on the part of the non-moving party arise. Celotex Corp., 477 U.S. at 323, 106 S.Ct. 2548; *Chanel, Inc. v. Italian Activewear of Florida*, 931 F.2d 1472, 1477 (11th Cir.1991). At that time, the non-moving party must present "significant, probative evidence demonstrating the existence of a triable issue of fact." *Id.* If the non-moving party fails to do so, the moving party is entitled to summary judgment. *Four Parcels of Real Prop.*, 941 F.2d at 1438.

All evidence and justifiable factual inferences should be viewed in the light most favorable to the non-moving party. *Rollins v. TechSouth, Inc.*, 833 F.2d 1525, 1532 (11th Cir.1987); *Everett v. Napper*, 833 F.2d 1507, 1510 (11th Cir.1987). "Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge." *Four Parcels of Real Prop.*, 941 F.2d at 1438 (quoting *Anderson*, 477 U.S. at 248, 106 S.Ct. 2505). However, "the mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact." *Anderson*, 477 U.S. at 248, 106 S.Ct. 2505.

IV. *Cross-Motions for Summary Judgment*

White initially moved for "partial summary judgment" on two issues. First, White argues that

the Plan provides a 60% floor for disability benefits. Second, White argues that even if Coca-Cola can offset monthly disability benefits on the basis of SSDI benefits, Coca-Cola is prohibited from recovering alleged overpayments of disability payments on the basis of a retroactive lump sum payment of SSDI benefits. In response, Coca-Cola has moved for summary judgment on the same issues raised by White, and has also moved for summary on Warner's claims, which are identical to those raised by White. Accordingly, the Court will treat the motions as cross motions for summary judgment on all claims.

A. *The 60% Floor for Plan Benefits*

At the outset, the Court notes that there have been two decisions by courts in the Eleventh Circuit addressing the 60% floor limitation in the Plan. In *Oliver v. The Coca-Cola Company,* the United States District Court for the Northern District of Alabama determined that there was a 60% floor limitation based on a *de novo* review of benefits denial and general principles of contract law. 397 F.Supp.2d 1327, 1330 (N.D.Ala.2005). In *Byars v. The Coca-Cola Company*, Judge Thrash permitted benefits payments to be offset below 60% of Average Compensation without comment.[FN2] Civil Action No. 1:01-cv-3124-TWT, Docket # 229 (N.D.Ga. Sept. 27, 2006). Both cases are presently on appeal to the

FN2. The Court understands that Judge Thrash found for the plaintiff in *Byars*, but that finding is irrelevant to the instant action.

United States Court of Appeals for the Eleventh Circuit.

Plaintiffs claim that the Plan clearly discloses a 60% floor on disability benefits. Specifically, Plaintiffs rely on the Proviso Clause at the end of the Offset Provision in § 4.2(a), which states that "the offset for other disability benefits will not serve to reduce the Disability Benefit under this Plan to an amount less than 60 percent of the Participant's Average Compensation as limited." Accordingly, Plaintiffs argue that the Committee's determination of their monthly disability benefits from the Plan are incorrect, because they receive less than 60% of their Average Compensation. Coca-Cola responds that the Plan does not contain a 60% floor on benefits, and that it has correctly applied the formula for offsetting disability benefits from other sources to White and Warner.

There is no standard for reviewing decisions of plan administrators or fiduciaries provided in ERISA. *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 109, 109 S.Ct. 948, 103 L.Ed.2d 80 (1989). The United States Court of Appeals for the Eleventh Circuit uses one of three distinct standards for reviewing administrators' plan interpretations and decisions:

> (1) *de novo* where the plan does not grant the administrator discretion [i.e., does not exercise discretion in deciding claims;] (2) arbitrary and capricious [where] the plan grants the administrator [such] discretion; and (3) heightened

> arbitrary and capricious where [the plan grants the administrator such discretion but] ... [he has] ... a conflict of interest.

Williams v. BellSouth Telecomms., Inc., 373 F.3d 1132, 1134 (11th Cir.2004) (quoting *HCA Health Servs. of Georgia, Inc. v. Employers Health Ins. Co.*, 240 F.3d 982, 993 (11th Cir.2001)). The Eleventh Circuit has further refined the approach "for use in virtually all ERISA-plan benefit denials," including those based on plan interpretations, as follows:

> (1) Apply the *de novo* standard to determine whether the claim administrator's benefits-denial decision is "wrong" (i.e., the court disagrees with the administrator's decision); if it is not, then end the inquiry and affirm the decision.
>
> (2) If the administrator's decision in fact is "*de novo* wrong," then determine whether he was vested with discretion in reviewing claims; if not, end judicial inquiry and reverse the decision.
>
> (3) If the administrator's decision is "*de novo* wrong" and he was vested with discretion in reviewing claims, then determine whether "reasonable" grounds supported it (hence, review his decision under the more deferential arbitrary and capricious standard).
>
> (4) If no reasonable grounds exist, then end the inquiry and reverse the administrator's decision; if reasonable grounds do exist, then determine if he operated under a conflict of interest.

(5) If there is no conflict, then end the inquiry and affirm the decision.

(6) If there is a conflict of interest, then apply heightened arbitrary and capricious review to the decision to affirm or deny it.

Id. at 1139 (internal citations omitted). Although Coca-Cola asserts that the Court should first determine the applicable standard of review, both parties apply the *Williams* framework to the Committee's benefits determinations.[FN3]

1. *Was the Committee's Interpretation De Novo Wrong?*

The Court must first determine whether the Committee's interpretation of the Offset Provision, permitting offset of benefits below 60% of Average Compensation is *de novo* wrong. Plaintiffs argue that the plain terms of the Plan are unambiguous

FN3. The Eleventh Circuit has not consistently applied the *Williams* framework, instead at times stating that the first step in the analysis should be a determination of "which standard to apply in reviewing the claims administrator's benefits decision." *Tippitt v. Reliance Standard Life Ins. Co.*, 457 F.3d 1227, 1232. *Tippitt* cites *HCA* for the remaining steps of the analysis. *Id.* In *Williams*, the court explicitly "recapitulate[d]" the approach set out in *HCA* "in a simpler version." 373 F.3d at 1137. The Court finds that in the instant action, following the *Williams* framework resolves the question of which standard of review should be applied and resolves . the dispute over the Committee's benefits determinations.

and the Proviso Clause clearly indicates the presence of a 60% floor on benefits. In the alternative, Plaintiffs claim that if the terms are ambiguous, the principles of *contra proferentum* would apply. Pursuant to *contra proferentum*, ambiguous terms in the Plan should be construed against Coca-Cola as the drafter of the document. In response, Coca-Cola asserts that the Plan is ambiguous on its face, but concedes that the Committee's interpretation of the Offset Provision may be found *de novo* wrong on the basis of *contra proferentum*.

The Court finds that the Plan is internally inconsistent and ambiguous on its face. Section 4.1(b) provides that "no participant can receive a monthly benefit from this Plan in excess of 60% of his Average Compensation...." However, the Offset Provision calculates disability benefits by starting with 70% of Average Compensation and subtracting the amount of disability benefits from other sources. [Plan Doc. Section 4.2(a)]. Finally, the Offset Provision states both that the difference cannot exceed 60% of Average Compensation and that "the offset for other disability benefits [can]not serve to reduce the Disability Benefit under this Plan to an amount less than 60% of the Participant's Average Compensation." *Id.* The only way to reconcile the 60% cap of Section 4.1(b) with the 60% floor of Section 4.2(a) is to award benefits at exactly 60%. However, such a result would render the explicit language of the Offset provision, awarding 70% of Average Compensation minus other disability

benefits, meaningless.

The other potential reading of the terms would be to start with the Offset Provision and award 70% of Average Compensation minus other disability benefits. However, this formula conflicts with either the 60% Cap of both Section 4.1(b) and 4.2(a) or the 60% Floor of Section 4.2(a). The Plan is patently ambiguous with respect to the 60% Cap, 60% Floor and Offset Provision.

As Coca-Cola concedes, however, the doctrine of *contra proferentum* supports a finding that the Committee's interpretation of the Offset Provision was *de novo* wrong. Pursuant to Eleventh Circuit precedent, ambiguities in ERISA plans are construed against the drafter of the document, and the claimant's interpretation is viewed as correct. *Lee v. Blue Cross/Blue Shield of Alabama*, 10 F.3d 1547, 1551 (11th Cir.1994). Accordingly, the Court finds that the Committee's interpretation, permitting offset of benefits below 60% of Average Compensation, is *de novo* wrong.

2. *Was the Committee Vested with Discretion?*

Turning to the second step in the Williams analysis, the Court must determine whether the Committee was vested with discretion in reviewing claims and interpreting the plan. Plaintiffs claim that they "cannot agree which standard of review should be made by this Court," and specifically assert in their Motion for Summary Judgment that the discretion of the Committee is unclear. [Pl. Mot. for Summary

Judgment, 7-8]. However, in their Response to Coca-Cola's Motion for Summary Judgment, Plaintiffs concede that "the Plan grants the Committee complete and final discretionary authority to construe the [P]lan and decide all questions arising under the [P]lan and specifically to determine the eligibility of participants to receive benefits and the amount of benefits to which any participant may be entitled under the plan...." [Pl. Resp., 7].

Plaintiffs assert that despite any explicit grant of discretion to the Committee, such discretion should not be recognized in the instant action because: (1) the SPD and administrative booklets do not grant the Committee discretion in interpreting plan terms; (2) John Howland, a member of the Committee was involved in both the initial denial of benefits and the administrative appeals process; (3) the Committee was incapable of fairly construing a contract drafted and amended by the Committee or Coca-Cola; and (4) the Committee had prejudged White's appeal. In response, Coca-Cola argues that the Plan's explicit grant of discretion to the Committee is not overcome by any of Plaintiffs' arguments.

As Plaintiffs concede in both their Response to Coca-Cola's Statement of Undisputed Facts and Response to Coca-Cola's Motion for Summary Judgment, § 7.2(b) of the Plan grants complete and final discretionary authority "to construe the Plan and decide all questions arising under the Plan," and "to determine the eligibility of Participants to receive benefits and the amount of benefits to which any Participant may be entitled under the Plan."

Accordingly, unless Plaintiffs are correct in one of their four arguments, the Committee is entitled to deference and its decision will be reviewed under either the arbitrary and capricious standard or the heightened arbitrary and capricious standard.

a. *Conflict Between the Plan and SPD*

First, Plaintiffs argue that although the Plan Document grants the Committee complete and final discretion regarding plan interpretation, the SPDs and Administrative booklets do not contain a grant of discretionary authority over plan interpretation. The SPD provides that the Committee "has sole authority to review and make determinations on all claims for benefits and all decisions of the [Committee] will be final and binding on all affected parties." [White Claim File, Ex. 1 to Gilbreath Aff., at Coca-Cola 000314]. Plaintiffs argue that the lack of explicit language related to plan interpretation in the SPD creates a conflict with the Plan. Furthermore, Plaintiffs claim that they relied on the SPDs, and that the inconsistency between the Plan and the SPD should be resolved by finding that the SPD, which is silent on plan interpretation, should control.

The Eleventh Circuit does not require that discretionary language be contained in the SPD. *Cagle v. Bruner*, 112 F.3d 1510, 1517 (11th Cir.1997). Rather, courts are directed to "look to all of the plan documents to determine whether the plan affords the [plan administrator] enough discretion to make the arbitrariness standard

applicable." Id. A difference in language between the Plan Document and the SPD does not necessarily create conflict. *Liberty Life Assur. Co. of Boston v. Kennedy*, 358 F.3d 1295, 1301 (11th Cir.2004). A conflict exists:

> if the employee were somehow misled by the Summary Plan Description, which is a document intended to be accurate and comprehensive and which reasonably apprises an employee of his or her rights under the Plan.

McKnight v. S. Life & Health Ins. Co., 758 F.2d 1566, 1570 (11th Cir.1985).

Before a court can "prevent an employer from enforcing the terms of a plan that are inconsistent with those of the plan summary, a beneficiary must prove reliance on the summary." *Branch v. G. Bernd Co.*, 955 F.2d 1574, 1579 (11th Cir.1992). If a plan participant proves reasonable reliance on an SPD, the terms of the SPD will prevail over the terms of the Plan. *McKnight*, 758 F.2d at 1570. Furthermore, "reliance is only relevant when an estoppel principle is present, such as when an employee asserts he or she is entitled to benefits under the language of a summary plan description and the employer contends that a plan document controls and precludes benefits." *Liberty Life*, 358 F.3d at 1302.

The Court finds that the difference between the discretion-granting language of the Plan document and the SPD does not create a conflict. The grant of

discretion to the Committee to interpret the plan contained in the Plan document and the lack of such a grant in the SPD are not irreconcilable. *See* id. at 1300. Furthermore, even were the Court to find that there was a conflict between the Plan and the SPD, Plaintiffs have failed to prove reliance on this conflict. The only reference to reliance made by Plaintiffs appears in the affidavits that accompany the Complaint, wherein both Plaintiffs assert that they "read the Summary Plan Description and administrative booklet concerning long term disability and relied on same." [White Aff., ¶ 4; Warner Aff., ¶ 4]. There are no details about how exactly Plaintiffs relied on the SPD, and there are no principles of estoppel implicated by the question of plan interpretation. Accordingly, Plaintiffs cannot overcome the grant of authority and discretion over plan interpretation contained in the Plan on the basis of a conflict with the SPD.

b. *Inherent Procedural Irregularities*

According to Plaintiffs, the most important reason to set aside the Committee's exclusive discretion is on the basis of "inherent procedural irregularities in Coca-Cola's administrative appeal system...." [Pl. Resp. at 8]. Specifically, White contends that John Howland, a member of the Committee, participated in both the initial decision and the final administrative appeal, in violation of 29 C.F.R. §§ 2560.503-1(h)(3)(ii) and (4). Warner argues that ING, the third-party administrator at the time his benefits were offset, violated 29 C.F.R. § 2560.503-1(g)(iv) by failing to mention that he could

administratively appeal the decision to offset his benefits and recoup retroactive overpayments.

In support of his argument, White relies on e-mails sent by John Howland regarding White's benefits. Specifically, White quotes the following, which he claims was part of an e-mail to Liberty Mutual:

> if we reinstate [White's] LTD benefit beginning August 1, 2004, that is a period of 15 months (August 2004 to October 2005) that we would otherwise owe him. This comes to a total of \$8,470.90 which is subtracted from his retroactive award balance he "owes" us, leaving a balance of \$24,352.00. If we divide 24,352/564.86 that comes to 43.11, which means if he is unable to pay us back any of the \$34,352 now, we would not pay him any LTD for the next 43 months, beginning in November, 2005.

[Pl. Resp., Ex. 3, at 5] According to White, after receiving Howland's e-mails, Liberty Life sent letters to White on December 1, 2005 and February 8, 2006 concerning the offset and retroactive recoupment. [Pl. Resp., Ex. 4]. Finally, Howland, in his capacity as a member of the Committee, voted to uphold Liberty Life's initial decision, and seconded the motion to deny White's disability claim. Warner's argument is based solely on the fact that the letter from ING, informing Warner of the offset and recoupment, did not provide Warner with notice that he could administratively appeal the decision.

The only case law referenced by Plaintiffs is <u>Torres</u>

v. Pittston Company, wherein the Eleventh Circuit stated:

> The Labor Department has taken the position that a denial occurring without the minimum procedural safeguards provided in the ERISA statutes and regulations should not be reviewed deferentially. In adopting the version of the "deemed denial" regulation that applies to Torres' claim (based on its date of filing), the Labor Department said that, where an ERISA plan administrator denies benefits without providing a timely and complete notice of decision comporting with ERISA requirements, "[i]t is the Department's view that, in such a case, any decision that may have been made by the plan with respect to the claim is not entitled to the deference that would be accorded to a decision based upon a full and fair review that comports with the requirements of (the ERISA statute)."

346 F.3d 1324, 1333 n. 11 (11th Cir.2003) (internal citations omitted). However, Plaintiffs have removed any reference to the "deemed denial" regulation present in the quoted passage.

The Court finds that neither the evidence nor case law supports Plaintiffs' claims that the Committee is not entitled to deference because of procedural irregularities. First, with respect to White's claims, the e-mail from John Howland quoted by White appears to have been sent to Mary Williams, who, based on her e-mail address, is an employee of Coca-Cola, not Liberty Mutual. [Pl. Resp. Ex. 3, at 5].

Furthermore, in an unquoted portion of the e-mail that precedes the passage quoted by White, Howland states, "Liberty has calculated the total amount of his retroactive social security award as $32,824.90[.]"*Id.* This sentence indicates that the calculations Howland is providing to Williams, another employee of Coca-Cola, have been made by Liberty, not by Howland himself. In fact, the other e-mail on page 5 of the Exhibit, from Harriet Michael, a Liberty employee reveals that almost all of the calculations that White attributes to Howland originated with Liberty. *Id.* The letters that were ultimately sent by Liberty to White contain calculations that differ from those in Howland's e-mail, further indicating that Howland did not direct Liberty's calculations of the retroactive offset of White's claims.

With respect to Warner's claims that the letter from IGN [Pl. Resp., Ex. 5] violates 29 C.F.R. § 2560.503-1(g)(iv), the Court finds that the regulations at issue relate to the required procedure for the denial of a claim or the termination of plan benefits, neither of which are applicable. The ING letter clearly discloses the application of the Offset Provision and the intended recoupment of overpayments based on the retroactive award of SSDI benefits. *Id.* The regulation raised by Warner is an implementing regulation for 29 U.S.C. § 1133, which by its clear and unambiguous language applies only when a "claim for benefits under the plan has been denied." The ING letter discloses the operation of the Offset Provision and explains the means of recoupment for the overpayment, yet it is clear that Warner was

still paid a monthly disability benefit. The benefit was offset by the SSDI benefit and was applied to recoup the money owed to Coca-Cola for retroactive overpayment, so the ING letter cannot be considered a denial of a claim for benefits that implicates § 1133 and the regulations cited by Warner. *See* *Butler v. Aetna U.S. Healthcare, Inc.*, 109 F.Supp.2d 856, 864 (S.D.Ohio 2000) (finding § 1133 inapplicable to recoupment based on lump sum Social Security award).

Finally, Plaintiffs' selective quotation of *Torres* is unpersuasive. The *Torres* court explicitly referred to the Department of Labor's position regarding the adoption of the "deemed denial" regulation of ERISA. 346 F.3d at 1333 n. 11. Plaintiffs have removed the reference to the "deemed denial" regulation and stated that any "decision made in the absence of the mandated procedural protections should not be entitled to any judicial deference." [Pl. Resp., at 10]. In fact, the *Torres* court did not make any holding regarding whether any "denial occurring without the minimum procedural safeguards provided in the ERISA statutes and regulations should not be reviewed deferentially." 346 F.3d at 1333. In *Brucks v. The Coca-Cola Company*, 391 F.Supp.2d 1193 (N.D.Ga.2005), Judge Duffey of this Court stated:

> [a]lthough *Torres* leaves open the possibility that an administrator's failure to comply with the procedural deadlines set out in the regulations may alter the otherwise-applicable standard of review, critical to the *Torres* court's discussion was

the fact that the regulation at issue expressly stated that the administrator's failure to comply with a deadline resulted in the claim being "deemed denied."

Brucks, at 1201.

As in *Brucks*, the regulations that Plaintiffs claim were violated by Coca-Cola do not "expressly provide[ ] that a failure to comply with them results in a claim being deemed denied, nor do they otherwise indicate that such a failure affects the standard of review to be applied to the administrator's decision." *Id.* The alleged violations are relevant only in determining whether the Committee's decision was arbitrary and capricious, not to a determination of the proper standard of review, and do not justify obviating the express discretionary grant to the Committee. *Id.*

c *Fairness and Prejudgment*

Plaintiffs' last two grounds for not deferring to the discretion of the Committee are: (1) the Plan was drafted and amended by Coca-Cola and the Committee, and as "a matter of fairness, the Committee should not have been the decision maker"; and (2) the Committee had prejudged the offset issue, because it consistently followed the practice of offsetting social security benefits. [Pl. Resp., at 10-11]. Plaintiffs cite no case law to support these arguments, and the Court finds that the undisputed evidence that Coca-Cola consulted with outside counsel in determining White's

administrative appeal mitigates any concerns about fairness and prejudgment. These arguments may be relevant to determining whether the Committee's decision was arbitrary and capricious, but do not warrant less judicial deference.

Accordingly, the Court finds that the Committee was vested with discretion in reviewing claims and interpreting terms of the Plan.[FN4]

3. *Are There Reasonable Grounds of Support for the Committee's Decision?*

Having determined that the Committee is entitled to judicial deference, the Court proceeds to the third step of the Williams framework - a review of the Committee's decision under the arbitrary and capricious standard to determine whether "reasonable" grounds support it.

FN4. In *Oliver*, the court determined that the denial of a benefit claim was not entitled to judicial deference based on a finding that the administrative services provider at the time, Broadspire, was the "real decision-maker." 397 F.Supp.2d at 1321. In part, this finding was based on " 'the Committee's' knee-jerk concurrence in Broadspire's denial...." *Id.* at 1324. Plaintiffs have not alleged that anyone other than Coca-Cola was the real decision-maker with respect to their claims. The only "decision" regarding either Plaintiff's claims was made by the Committee in White's administrative appeal, and Plaintiffs do not dispute this fact. Unlike *Oliver*, neither party was denied benefits by the administrative services provider. Their benefits continued, albeit in an amount offset by SSDI benefits. Accordingly, the Court finds the *Oliver* real decision-maker analysis to be inapplicable to the instant action.

Plaintiffs argue that the plain language of the Proviso Clause discloses the 60% floor for disability benefits. Furthermore, Plaintiffs assert that the Committee's use of extrinsic evidence in resolving the ambiguity of the Plan contravenes Georgia State contract law, specifically the principle of *contra proferentum*. In response, Coca-Cola argues that application of *contra proferentum* at this step in the Williams framework is inappropriate, and the facts support a finding that the Committee's decision was reasonable.

Plaintiffs cite at length numerous decisions regarding contractual interpretation under Georgia law. It is well-established that because ERISA "does not provide any guidance on how a court should interpret provisions in an employee welfare benefit plan," federal courts are authorized "to develop a body of federal common law to govern issues in ERISA actions not covered by the act itself." *Tippitt*, 457 F.3d at 1234-35. The federal common law of ERISA "may look to state law as a model because of the states' greater experience in interpreting insurance contacts and resolving coverage disputes." *Horton v. Reliance Standard Life Ins. Co.*, 141 F.3d 1038, 1041 (11th Cir.1998). However, the Eleventh Circuit has also made clear "that when a federal court construes an ERISA-regulated benefits plan, the federal common law of ERISA supersedes state law." *Buce v. Allianz Life Ins. Co.*, 247 F.3d 1133, 1142 (11th Cir.2001).

The Plan contains an express choice-of-laws provision, indicating that it will be construed in accordance with the laws of the State of Georgia. [Plan Doc. § 7.10]. Despite this explicit choice of law, however, "ERISA's preemptive authority sweeps broadly to preclude the application of provisions of state law (statutory or decisional) that would undercut the uniform implementation of ERISA's text or its attendant case law." Buce, 247 F.3d at 1148. In *Buce,* there was a Georgia choice of law provision and the Eleventh Circuit applied the Georgia doctrine of "accidental means" to determine whether a death was accidental. *Id.* The Eleventh Circuit held that the "accidental means" doctrine could be applied because "[the court had] been pointed to no ERISA statutory language, and no cases formulating the common law of ERISA, which suggest that the agreement of the parties to utilize Georgia doctrine would be subversive of ERISA policy." *Id.*

With respect to the application of *contra proferentum,* the Eleventh Circuit has reached the opposite conclusion. In *HCA,* the case that established the framework that was refined in *Williams,* the court first acknowledged that *contra proferentum* is applicable to ERISA cases and that "[w]hen a plan is ambiguous, the principle of *contra proferentem* requires that ambiguities be construed against the drafter of a document; as such, the claimant's interpretation is viewed as correct." 240 F.3d 982, 994 n. 24 (11th Cir.2001). However, the court held that even where *contra proferentem* renders the claimant's interpretation of an

ambiguous claim term correct, the claimant does not automatically prevail on an ERISA claim. Id. at 994. The court explained:

> At first glance it seems odd that a reasonable interpretation would not automatically defeat a wrong interpretation. The reason the claimant's reasonable interpretation does not trump the claims administrator's wrong interpretation is because the plan documents explicitly grant the claims administrator discretion to interpret the plan. We cannot over emphasize the importance of the discretion afforded a claims administrator; the underlying premise of arbitrary and capricious, rather than *de novo*, review is that a court defers to the discretion afforded the claims administrator under the terms of the plan. To find a claims administrator's interpretation arbitrary and capricious, the court must overcome the principle of trust law which states that a trustee's interpretation will not be disturbed if it is reasonable. Thus, the next step requires the court to determine whether the claims administrator's wrong interpretation is nonetheless reasonable. If the court determines that the claims administrator's wrong interpretation is reasonable, then this wrong but reasonable interpretation is entitled to deference....

Id.(internal citations omitted).

In other words, *contra proferentum* is applicable at the initial stage of the Williams framework, in order to determine whether the Committee's decision was

de novo wrong. But *contra proferentum* would render the arbitrary and capricious standard meaningless if applied at the third step of the Williams framework where, as here, the Committee has been vested with discretion to interpret the Plan. Application of *contra proferentum* in the manner advocated by Plaintiffs would "be subversive of ERISA policy." Buce, 247 F.3d at 1148.

Tippitt does not hold otherwise. The district court in Tippitt had determined that a denial of benefits was *de novo* "right", rather than *de novo* "wrong" and did not proceed in its analysis beyond that determination. 457 F.3d at 1233. The Eleventh Circuit applied *contra proferentum*, to resolve the ambiguities against the plan drafter, and reversed the district court's finding that the denial of benefits was *de novo* "right". *Id.* at 1235. The case was remanded to the district court "to complete the remaining steps of the process...." *Id.* at 1238-39.

If Plaintiffs are correct that *contra proferentum* applies throughout every step of the *Williams* framework, there would be no need to remand Tippitt to complete the rest of the process. Any plan participant who can show an ambiguity in an ERISA plan would automatically win on the basis of *contra proferentum*, and there would be no need for the well-established three-tiered review system for ERISA claims. Cagle, 112 F.3d at 1519 ("The 'reasonable interpretation' factor and the arbitrary and capricious standard of review would have little meaning if ambiguous language in an ERISA plan were construed against the [plan administrator].").

Although the Court agrees that, in general, "all words in a contract are to be given meaning" and "that any ambiguity in a contract is to be resolved against the draftsman," in the context of the clear framework for deciding ERISA cases laid out in *Williams*, such general principles of contract interpretation are inapplicable. *Oliver*, 397 F.Supp.2d at 1330.

In reviewing the Committee's interpretation, "[a]s long as a reasonable basis appears for [the] decision, it must be upheld as not being arbitrary and capricious." *Jett v. Blue Cross and Blue Shield of Alabama, Inc.*, 890 F.2d 1137, 1140 (11th Cir.1989). In making its determination regarding White's benefits, the Committee retained outside ERISA counsel to analyze the application of the Offset Provision and commissioned a report from said outside counsel. The Committee determined that the Plan was patently ambiguous because the Offset Provision, 60% floor and 60% ceiling created internal inconsistencies. After reviewing extrinsic evidence, such as the examples of the application of the Offset Provision in the SPD, the Committee determined that the Offset Provision was intended to function without a 60% floor. Including the 60% floor would render the application of the Offset Provision meaningless, because benefits would have to equal exactly 60% of Average Compensation. Furthermore, the Committee recognized that there had been uniform application of the Offset Provision as outlined by the examples in the SPD and without a 60% floor on benefits.

Based on the undisputed facts, the Court finds that the Committee's interpretation of the Offset Provision was reasonable.

4. *Was There a Conflict of Interest?*

Having found that reasonable grounds for the Committee's plan interpretation existed, the Court turns to the fourth step under *Williams,* a determination of whether the Committee operated under a conflict of interest. Plaintiffs argue that the funding structure of the Plan, as disclosed on two federal filings and in the administrative booklets for the Plan, as well as the discretion granted to the Committee to change, modify or amend the Plan at any time, create a conflict of interest. In response, Coca-Cola asserts that the fund is structured in such a way as to prevent any conflict of interest on the part of the Committee.

In plan interpretation cases, such as this one, the Eleventh Circuit has adopted a two-step, burden-shifting, approach in addressing conflicts of interest. First, the claimant must show "that the administrator of a discretion-vesting plan is conflicted." *Williams*, 373 F.3d at 1138. Once the claimant makes this showing, the administrator must then "prove [ ] that his plan interpretation was not tainted by self-interest." *Id.* A wrong but apparently reasonable interpretation will be found arbitrary and capricious "if it advances the conflicting interest of the administrator at the expense of the claimant." *Id.* However, "if the administrator can demonstrate a routine practice or

give other plausible justifications ... judicial deference to it may be granted...." Id.

The Eleventh Circuit has held that no conflict of interest exists where "benefits are paid from a trust fund through periodic, nonreversionary contributions." *Buckley v. Metro., Life*, 115 F.3d 936, 939 (11th Cir.1997). Conversely, a conflict of interest has been found when an insurance company administers claims under a policy it issued, "[b]ecause an insurance company pays out to beneficiaries from its own assets rather than the assets of a trust, its fiduciary role lies in perpetual contact with its profit-making role as a business." *Brown v. Blue Cross & Blue Shield of Alabama, Inc.*, 898 F.2d 1556, 1562 (11th Cir.1990). The *Brown* standard has been extended beyond the context of insurance companies, and the Eleventh Circuit applies heightened arbitrary and capricious review when beneficiaries are paid out of the general assets of the plan's fiduciary. *Levinson v. Reliance Standard Life Ins. Co.*, 245 F.3d 1321, 1326 (11th Cir.2001).

In *Brucks*, Judge Duffey found that the "Plan benefits were paid from a trust which Coca-Cola funded through irrevocable, periodic contributions." 391 F.Supp.2d at 1200. Plaintiffs first argue that two annual forms filed with the IRS disclose that the benefits are actually paid from general assets of Coca-Cola. These forms, Form 5500 Annual Return/Report of Employee Benefit Plan, filed for the years 2003 and 2004 both indicate that the Plan is funded and benefits are paid from a trust and

general assets. [Pl. Mot., Ex. 6, Lines 9a and 9b]. Furthermore, according to Plaintiffs, the fact that Administrative Information for SPDs states that "some of the plans are administered through insurance companies or other providers for an administrative fee, with benefits paid by the Company from its general assets," indicates that there is a conflict of interest. [Gilbreath Aff., Ex. 1, at Coca-Cola 000343]. Finally, although Plaintiffs concede that any money in the trust cannot revert to Coca-Cola, the Committee may decide not to fund the trust at all.

In response, Coca-Cola relies on the Form 5500 filed for 2005, which only indicates funding and benefits through a Trust. [Gilbreath Aff. Ex. 18]. White's administrative appeal was decided during the period of time that the 2005 Form 5500 controlled the Plan. Furthermore, Coca-Cola has provided sworn testimony indicating that the Plan has never paid benefits from its general assets. [Gilbreath Aff., at ¶¶ 32-33]. The Administrative Information that Plaintiffs cite also explicitly discloses that, with respect to the Plan, the benefits of pre-2003 participants (such as White and Warner) are "funded through a trust to which the Company contributes." [Gilbreath Aff., Ex. 1, at Coca-Cola 000346]. Plaintiffs cannot claim that they relied on the information disclosed in the SPDs only where it is beneficial to their claims.

The Trust's qualification as a Voluntary Employees' Beneficiary Association ("VEBA") under the Internal Revenue Code § 501(c)(9) is also persuasive. The tax-

exempt status conferred by VEBA recognition carries strict requirements preventing reversion of trust assets. In fact, courts have held that funding a benefits plan through a VEBA trust "minimize[s] a potential conflict of interest." *Smith v. Bayer Corp. Long Term Disability Plan*, 444 F.Supp.2d 856, 869 (E.D.Tenn.2006). Finally, as Plaintiffs concede, the Trust document plainly establishes that "in no event shall any part of the Trust Fund attributable to the Plan revert to Coca-Cola." [Gilbreath Aff., Ex. 8, § 8.02]. Plaintiffs cite to no cases indicating that the "periodic contribution" aspect of *Buckley* requires an explicit statement of when such contributions will be made.

Plaintiffs argue that at a minimum they are entitled to discovery as to how the plan is funded, and this argument is a significant component of the Motion to Compel Discovery currently before the Court. However, based on the evidence, the Court finds that the Plan is funded through periodic contributions to an irrevocable trust, and accordingly no conflict of interest can exist. Plaintiffs are not entitled to further discovery on this issue.

Accordingly, because the Court has found that the Committee's interpretation of the Plan was reasonable and the Committee did not have a conflict of interest, under the arbitrary and capricious standard Coca-Cola is entitled to summary judgment on the 60% floor and the application of the Offset Provision. The Court finds that the Plan does not disclose a 60% floor on

benefits.

B. *Recoupment of Overpayment*

Plaintiffs argue that even if the Court finds that there is not a 60% floor on benefits, Coca-Cola may not recover any alleged overpayment based on the retroactive award of SSDI benefits. According to Plaintiffs, Coca-Cola can neither establish that it overpaid Plaintiffs nor that it has a legal or equitable right to recover said overpayments. Coca-Cola responds that federal courts routinely permit plan administrators to recover overpayments resulting from retroactive awards of SSDI benefits.

Unlike the 60% floor dispute, the Committee did not interpret the provisions governing overpayment and recoupment. Rather, White did not request an interpretation of the provisions during his administrative appeal. Based on the *Williams* framework, it appears that Plaintiffs are attempting to argue that the application of the Recoupment Provision by the Committee was *de novo* "wrong", and entitled to no deference.

Specifically, Plaintiffs assert that "nothing in the Plan indicates Coca-Cola overpaid the Plaintiffs." [Pl. Mot., at 18]. However, the Plan document states that, "[i]f the Participant receives a retroactive payment of a disability benefit ..., the benefit will be considered to have been paid throughout the period for which it is payable." [Plan Doc. § 4.2(d)]. Furthermore, § 4.2(e) of the Plan provides that, "[a]ny overpayment of Disability Benefits arising

under Subsection ... (d) will be deducted from the Participant's future payments [from the Plan]." Based on the application of the Offset Provision, which has been found to not contain a 60% floor on benefits, the Committee determined that Plaintiffs had been overpaid as a result of the retroactive payment of SSDI. This determination is within the explicit provisions of §§ 4.2(d) and (e).

Plaintiffs contend that even if they were overpaid, Coca-Cola has no right to seek repayment. According to Plaintiffs, Coca-Cola cannot recover any overpayment from them because Coca-Cola would not be able to sue Plaintiffs under ERISA § 502(a)(3), which limits recovery to "appropriate equitable relief." *See* *Eldridge v. Wachovia Corp. Long-Term Disability Plan*, 383 F.Supp.2d 1367, 1370 (N.D.Ga.2005). However, the present lawsuit was not instituted by Coca-Cola pursuant to § 502(a)(3), but rather Plaintiffs are seeking additional benefits pursuant to ERISA § 502(a)(1)(B). As such, it is Plaintiffs, not Coca-Cola who have the burden of proving that he is entitled to Plan benefits. *Horton v. Reliance Standard Life Ins. Co.*, 141 F.3d 1038, 1040 (11th Cir.1998).

Plaintiffs also cite a recent decision by Judge Carnes of this Court, which they claim "indicates there is no difference between recoupments and offsets," and that Coca-Cola cannot recover anything from Plaintiffs. [Pl. Resp., at 22]. In *Smith v. Life Insurance Company of North America*, Judge Carnes found that despite plain language of a disability plan, the plan administrator was not entitled to

offset monthly benefits as a result of a participant's tort recovery unless the participant has been "made whole" by the judgment. 466 F.Supp.2d 1275, 1285 (N.D.Ga.2006). The *Smith* decision was based, in part, on the fact that the Eleventh Circuit had expressly recognized the make whole doctrine as part of the federal common law with respect to ERISA claims. *Id.* (citing *Cagle*, 112 F.3d at 1521). *Smith* is specifically applicable to the context of tort recovery and the make whole doctrine, which are not implicated in the instant action.

Numerous courts have approved of the recoupment of retroactive SSDI awards. *See e.g., Butler*, 109 F.Supp.2d at 861; *Calloway v. Pacific Gas & Elec. Co.*, 800 F.Supp. 1444, 1448 (E.D.Tex.1992); *Spray v. UNUM Life Ins. Co.*, 749 F.Supp. 800, 806 (W.D.Mich.1989); *Lessard v. Metropolitan Life Ins. Co.*, 568 A.2d 491, 496-498 (Me.1989); *Stuart v. Metropolitan Life Ins. Co.*, 664 F.Supp. 619, 622-624 (D.Me.1987), aff'd per curiam, 849 F.2d 1534; *Henning v. Metropolitan Life Ins. Co.*, 546 F.Supp. 442, 449-449 (M.D.Pa.1982); *see also Madden v. ITT Long Term Disability Plan*, 914 F.2d 1279, 1287 (9th Cir.1990); *Cooperative Benefit Adm'rs, Inc. v. Whittle*, 989 F.Supp. 1421 (M.D.Ala.1997); *Greig v. Metro. Life Ins. Co.*, 980 F.Supp. 169, 171 (W.D.Va.1997). The Court of Appeals for the Seventh Circuit recently rejected Plaintiffs' exact argument by declining "to rule that plan provisions authorizing recoupment of unreimbursed overpayments by a plan fiduciary are contrary to the statutory structure and the underlying policies of ERISA." *Northcutt v. Gen. Motors Hourly-Rate*

Employees Pension Plan, 467 F.3d 1031, 1036-37 (7th Cir.2006).

Accordingly, the Court finds that the Committee's determination of an overpayment based on a retroactive award of SSDI benefits, and the recoupment thereof through reduction of future benefits was permissible and *de novo* right. There is no need to proceed to the other steps of the Williams framework. Coca-Cola is entitled to summary judgment on this issue.

V. *Motion to Compel Discovery, Motion to Certify Class, and Motion for Leave*

Plaintiffs have also filed a Motion to Compel Discovery and a Motion to Certify Class, and Coca-Cola has filed a Motion for Leave to File Supplemental Motion for Summary Judgment.

In the motion to compel, Plaintiffs assert that they are entitled to discovery on a number of issues, including the funding of the Plan and potential conflicts of interest based on decision-making capacity. Having determined that there was no genuine issue of material fact that the Committee was vested with discretion to interpret the plan, that its decisions were either *de novo* right or wrong but reasonable, and that no conflict of interest exists based on the funding of the Plan, the requested discovery is unnecessary.

Plaintiffs also allege that they are entitled to discovery on the method Coca-Cola used to notify

participants of changes to the Plan. This issue was relevant to Coca-Cola's previously decided Motion to Dismiss, and in light of the Court's grant of summary judgment, this discovery is likewise unnecessary.

Accordingly, Plaintiffs' Motion to Compel Discovery is DENIED. Furthermore, based on the Court's grant of summary judgment to Coca-Cola, Plaintiffs' Motion to Certify Class and Coca-Cola's Motion for Leave to File a Supplemental Motion for Summary Judgment are DISMISSED AS MOOT.

VI. *Conclusion*

For the foregoing reasons, Plaintiff White's Motion for Partial Summary Judgment [Doc. 17] is DENIED, Defendant's Motion for Summary Judgment [Doc. 20] is GRANTED, Plaintiff's Motion to Compel [Doc. 23] is DENIED, Plaintiffs' Motion for Class Certification [Doc. 24] is DISMISSED AS MOOT, and Defendant's Motion for Leave to File a Supplemental Motion for Summary Judgment [Doc. 34] is DISMISSED AS MOOT.

The Clerk is DIRECTED to enter judgment for Defendant, with costs taxed to Plaintiffs.

SO ORDERED, this 2 day of August, 2007

/s/ Orinda D. Evans
UNITED STATES DISTRICT JUDGE

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 07-13938

[Filed November 7, 2008]

FRANKIE WHITE, LEON WARNER Individually and on Behalf of ALL Others Similarly Situated,
Plaintiffs-Appellants

versus

THE COCA-COLA COMPANY,
Defendant-Appellee

On Appeal from the United States District Court for the Northern District of Georgia

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ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

Before: Birch, Wilson and Pryor, Circuit Judges,

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having

requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for rehearing En Banc are DENIED

ENTERED FOR THE COURT:

/s/ William H. Pryor
United States Circuit Judge

122

(2)

No. 08-991

FILED
MAR 6 - 2009
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The
Supreme Court of the United States

FRANKIE WHITE, et al.,
Petitioners,
v.
THE COCA-COLA COMPANY,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF IN OPPOSITION

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March 6, 2009

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QUESTIONS PRESENTED

1) Whether an administrator of an ERISA plan that pays benefits from a periodically funded irrevocable trust is subject to the same conflict of interest as an administrator that pays benefits under its ERISA plan directly from the corporate coffers with an immediate impact on the company's profits.

2) Does the presence of a choice of law provision in an ERISA plan document require the application of a state law canon of contract interpretation that conflicts with the uniformly recognized application of the same canon under the federal common law of ERISA?

PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT

There are no parties to the proceedings other than those listed in the caption.

Respondent The Coca-Cola Company is the parent company. The Coca-Cola Company has hundreds of domestic and foreign consolidated subsidiaries. All of the consolidated subsidiaries are wholly-owned and none are publicly traded. The Coca-Cola Company's stock is publicly traded (NYSE: KO).

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STATEMENT OF THE CASE

I. The Plan

This case involves the interpretation of The Long Term Disability Income Plan of The Coca-Cola Company, an ERISA-governed welfare benefit plan sponsored by The Coca-Cola Company. Coca-Cola funds the Plan through periodic, irrevocable payments to the Trust Forming a Part of The Coca-Cola Company Long Term Disability Income Plan.[1] The Trust qualifies as a Voluntary Employees' Beneficiary Association ("VEBA") under the Internal Revenue Code.[2] In accordance with the deduction limitations imposed by the Code, Coca-Cola makes contributions to the Trust in amounts and at intervals recommended by an actuary.[3] Plan benefits are paid exclusively from the Trust.[4]

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[1] R2-20-Gilbreath Aff. ¶ 11; R2-20-Gilbreath Aff. Ex. 2 - Plan Doc. § 5.4; R2-20-Gilbreath Aff. Ex. 8 §§ 8.02, 11.11; *see* 26 U.S.C. § 501(c)(9). Effective January 1, 2003, Coca-Cola changed the Plan's funding mechanism to an insurance policy. But for Plan participants like Petitioners, who both became disabled before January 1, 2003, Plan benefits are paid from the Trust.

[2] R2-20-Gilbreath Aff. ¶ 13; R2-20-Gilbreath Aff. Ex. 9; *see* 26 U.S.C § 501(c)(a).

[3] *See* 26 U.S.C. § 419 (limiting allowable deduction for contributions to VEBA to its "qualified direct costs" and additions to its "qualified asset account," which cannot exceed the amount reasonably and actuarially necessary to fund claims incurred but unpaid as of the close of the plan year.) Petitioners concede that Coca-Cola contributes to the Trust based upon the recommendation of an actuary. (Petition at 2 n.3).

[4] R2-20-Gilbreath Aff. §§ 11-12.

II. The Underlying Allegations

Petitioners Frankie White and Leon Warner brought this case seeking to represent a class of participants whose payments from the Plan were offset to account for their receipt of disability benefits from other sources. Petitioners claimed that the terms of the Plan prohibited any offset.

Section 4.1 of the Plan states that a "Participant who incurs a Disability will receive monthly benefits in an amount equal to 60 percent of his Average Compensation, reduced to account for disability benefits payable from other sources, as required under Section 4.2."[5] Section 4.2, titled "Offset for Other Disability Benefits" (the "Offset Provision"), provides that "the monthly Disability Benefit payable from this Plan to the Participant who receives disability benefits from any source described in [the Plan] will be reduced" to account for a participant's receipt of those disability benefits.[6]

The Plan is intended to protect qualifying Coca-Cola employees against total loss of income while they recover from a disability.[7] It does not provide complete income replacement.[8] The default monthly benefit under the Plan is 60% of a participant's

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[5] R2-20-Gilbreath Aff. Ex. 2 - Plan Doc. § 4.1 (emphasis added).

[6] *Id.* § 4.2(a) (emphasis added).

[7] R2-20-Gilbreath Aff. ¶ 8.

[8] R2-20-Gilbreath Aff. Ex. 2 - Plan Doc. § 4.1.

Average Compensation (as defined in the Plan).[9] Many participants who qualify to receive disability benefits payments from the Plan also receive disability benefits from other sources, like Social Security. If so, the amount of disability benefits received from those other sources is deducted from 70% of the participant's Average Compensation, and the Plan pays the difference.[10] The effect of this formula is to increase the participant's total benefits (received from the Plan and the other sources) to a total of 70% of Average Compensation, while preserving Plan assets and avoiding the moral hazard that would occur if the amount of benefits a participant received (from all sources) exceeded the Average Compensation earned while working for Coca-Cola.[11]

The Plan's Summary Plan Description gives a concrete demonstration of how the Plan's Offset Provision works in either situation:

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[9] *Id.*

[10] *Id.* § 4.2.

[11] Petitioner White is a ready example of this moral hazard. If the Offset Provision is interpreted to prohibit offsets, as petitioners contend, petitioner White's total monthly disability benefits received (from the Plan and Social Security) would equal over 110% of the monthly Average Compensation he earned while working for Coca-Cola. *See* R2-20-Gilbreath Aff. Ex. 15 at Coca-Cola 000104.

LTD payment example

Suppose your basic monthly pay for disability purposes is $3,000 and you do not receive benefits from other sources.

Here is how your LTD payment is figured:

$ 3,000	Basic monthly pay before disability
x 60%	Maximum LTD pay replacement percentage
$ 1,800	Maximum monthly benefit from the LTD plan

If you begin receiving $750 in monthly Social Security disability payments, your LTD benefit will be reduced as follows:

$ 3,000	Basic monthly pay before disability
x 70%	Maximum pay replacement percentage from all sources
$ 2,100	Total amount of your pay to be replaced by all sources
- [$] 750	Monthly Social Security disability payment
$ 1,350	ACTUAL MONTLY BENEFIT FROM THE LTD PLAN

As the above example shows, the LTD Plan works with Social Security disability payments

> to bring your monthly income to 70% of your basic monthly pay.[12]

Despite this, petitioners claimed that a single clause at the end of the Offset Provision ("and provided further that the offset for other disability benefits will not serve to reduce the Disability Benefit under this Plan to an amount less than 60 percent of the Participant's Average Compensation")[13] absolutely prohibited offsets, no matter what the rest of the Plan provisions say.

III. Procedural Background

Petitioner White submitted that claim to the Plan's administrator, The Coca-Cola Company Benefits Committee, for administrative review.[14] The Plan grants the Committee complete and final discretionary authority to construe the Plan and decide all questions arising under it.[15] After carefully reviewing petitioner White's claim and obtaining an opinion from outside ERISA fiduciary counsel concerning the interpretation of an ambiguous Plan document, the Committee construed the Plan's Offset Provision to permit offsets.[16]

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[12] R2-20-Gilbreath Aff. Ex. 10 at Coca-Cola 000179.

[13] R2-20-Gilbreath Aff. Ex. 2 - Plan Doc. § 4.2(a).

[14] R2-20-Gilbreath Aff. ¶ 26; R2-20-Gilbreath Aff. Ex. 13.

[15] R2-20-Gilbreath Aff. ¶¶ 4-5; R2-20-Gilbreath Aff. Ex. 2 - Plan Doc. §§ 7.2(b)(2)-(3).

[16] R2-20-Gilbreath Aff. ¶¶ 27-30; R2-20-Gilbreath Aff. Exs. 14-17.

On behalf of themselves and a putative class of Plan participants, petitioners filed a suit in the District Court challenging the Committee's interpretation of the Offset Provision. The District Court reviewed the Committee's interpretation and found that it was reasonable. *See White v. The Coca-Cola Company*, 514 F. Supp. 2d 1353 (N.D. Ga. 2007). Because Plan benefits are paid from the Trust, rather than Coca-Cola's operating assets, the District Court applied well-settled Eleventh Circuit law and held that the Committee did not operate under a conflict of interest. *See White*, 514 F. Supp. 2d at 1370 (citing *Buckley v. Metropolitan Life*, 115 F.3d 936, 939 (11th Cir. 1997)). Accordingly, the District Court ruled that the Committee's reasonable interpretation of the Offset Provision was due deference and upheld its decision to deny petitioner White's claim. Petitioners appealed to the Eleventh Circuit, which affirmed the decision that is the subject of the petition for certiorari.

IV. Appellate Proceedings In This Case And The Related Oliver Appeal

When petitioners filed their appeal, another case involving the Plan's Offset Provision was already pending before the Eleventh Circuit: *Oliver v. The Coca-Cola Company*, Appeal No. 05-16509-DD. On August 29, 2007, less than a month after the District Court's decision in this case, a panel of the Eleventh Circuit issued an opinion in *Oliver* ruling that the language of the Plan's Offset Provision prohibited offsets. *See Oliver v. The Coca-Cola Company*, 497 F.3d 1181 (11th Cir. 2007). However, because the Offset Provision had neither been fully litigated in the *Oliver* district court proceeding nor ever presented to

the Committee for an administrative review, Coca-Cola filed a petition for rehearing challenging the *Oliver* panel's ruling on the Offset Provision as premature. Coca-Cola requested that the *Oliver* panel vacate the portion of its order addressing the Offset Provision and stay consideration of that issue pending a determination on a proper administrative and district court record in this case. On November 6, 2007, the Eleventh Circuit granted Coca-Cola's petition, vacated the portion of its opinion addressing the Plan's Offset Provision, and stayed proceedings in *Oliver* pending a ruling on that issue in this case. *See Oliver v. The Coca-Cola Company*, 506 F.3d 1316 (11th Cir. 2007).

On September 10, 2008, the Eleventh Circuit issued its opinion in this case affirming the District Court's rulings that the Committee's interpretation of the Plan's Offset Provision was reasonable and that the Committee did not operate under a conflict of interest. *See White v. The Coca-Cola Company*, 542 F.3d 848 (11th Cir. 2008). In doing so, the Eleventh Circuit followed the District Court's lead and relied on Eleventh Circuit precedents finding the absence of a conflict of interest when benefits are paid from a trust funded with irrevocable contributions. In its opinion, the Eleventh Circuit addressed the effect on circuit precedents of this Court's recent decision in *Metropolitan Life Insurance Co. v. Glenn*, __ U.S. __, 128 S. Ct. 2343 (2008), which Coca-Cola had submitted to the court as supplemental authority before oral argument. Specifically, the Eleventh Circuit recognized that *Glenn* implicitly overruled its precedent addressing how to take account of a conflict of interest in reviewing decisions made by a conflicted decision maker, but appeared to conclude that it did

not alter the analysis of whether a conflict was present. The court commented that "*Glenn* does not alter our analysis unless [the Committee] operated under a conflict of interest." *White*, 542 F.3d at 854. The court noted that Eleventh Circuit "law is clear that no conflict of interest exists where benefits are paid from a trust that is funded through periodic contributions so that the provider incurs no immediate expense as a result of paying benefits." *Id.* at 858 (quoting *Gilley v. Monsanto Co. Inc.*, 490 F.3d 848, 856 (11th Cir. 2007)). Thus, because the Committee's decision was more than reasonable (the relevant standard of review in the absence of a conflict), the Eleventh Circuit affirmed the District Court.[17] Petitioners filed a petition for rehearing on September 29, 2008, which the Eleventh Circuit denied on November 7, 2008.

In the interim, on October 30, 2008, the Eleventh Circuit's *Oliver* panel had issued a decision remanding that case to the district court for further proceedings consistent with the Eleventh Circuit's ruling in this case that the Offset Provision permitted offsets. *See Oliver v. The Coca-Cola Company*, 546 F.3d 1353 (11th

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[17] Subsequently, in a case involving an ERISA plan like that at issue in *Glenn*, where the insurance company both decided claims and paid benefits from its own assets, the Eleventh Circuit expressly recognized *Glenn* and conformed its law governing plan administrators that pay benefits from their own general assets to *Glenn's* holding. *See Doyle v. Liberty Life Assurance Co. of Boston*, 542 F.3d 1352, 1359 (11th Cir. 2008). Of course, *Doyle* did not call into question the continuing validity of the long line of Eleventh Circuit precedent finding no conflict of interest in the distinct situation here, which did not arise in *Glenn*, of payment of benefits from an irrevocable trust.

Cir. 2008). In its order the *Oliver* panel recognized this case as controlling precedent, but noted that "the district court can still consider whether the [C]ommittee operated under a conflict of interest" on remand because "[t]hough such a conflict was found not to be present in *White*, Oliver might be able to provide evidence of one." *Id.* at 1354. The *Oliver* panel went on to instruct that, "[b]ased on the Supreme Court's recent decision in *Glenn*[], this determination would only be one factor in the court's 'arbitrary and capricious' analysis, and would not necessitate application of a 'heightened arbitrary and capricious' standard," as prior Eleventh Circuit law had required. *Id.*

The remand ordered in the *Oliver* case has, until recently, been delayed by further litigation. On December 3, 2008, Oliver filed a rehearing petition in his case requesting that the Eleventh Circuit resolve what he contends is a conflict between the *Oliver* and *White* opinions. Specifically, Oliver contends the Eleventh Circuit's law is in conflict because "[t]he *Oliver* decision follows the recent U.S. Supreme Court case [*Glenn*] which requires consideration of conflict of interest and which reverses" Eleventh Circuit law that no conflict exists when benefits are paid from a trust, but "[a]t the same time, the *Oliver* decision affirms *White* which affirms the rule [from prior circuit law] that no conflict of interest can exist when benefits are paid from a [t]rust."[18] On March 3, 2009, the *Oliver* panel denied Oliver's petition for rehearing.

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[18] Petition for Rehearing at 7, *Oliver v. The Coca-Cola Company*, Appeal Docket No. 05-16509-DD (11th Cir. Dec. 3, 2008).

REASONS FOR DENYING THE WRIT

I. The Eleventh Circuit's Rule Concerning the Existence of a Conflict of Interest Where ERISA Benefits Are Paid from an Irrevocable Trust Is Not Yet Settled—Even as to Coca-Cola's Plan.

A. The Eleventh Circuit's Law Is Too Unsettled for This Court to Intervene.

Petitioners suggest that the Eleventh Circuit has definitively staked out a position on one side of a multiple circuit division of opinion on the existence of a conflict of interest, and they seek issuance of a writ of certiorari so that this Court can determine whether the funding arrangement of Coca-Cola's Plan gives rise to a conflict of interest. But Eleventh Circuit law is not nearly as settled as petitioners would have it, so much so that the question of whether there is a conflict of interest with respect to Coca-Cola's Plan is still being litigated in the Eleventh Circuit.

In its opinion below, the Eleventh Circuit, after acknowledging that *Glenn* had implicitly overruled prior Eleventh Circuit law concerning how to weigh a conflict of interest once it is determined to exist, noted that *Glenn* did not allow it to disregard binding Eleventh Circuit law holding that the payments of benefits from an irrevocable trust eliminates any inherent conflict of interest. Then, six weeks later, in an two-page opinion remanding *Oliver*, another panel of the Eleventh Circuit noted that, although the *White* panel's decision would generally be binding on the district court, it "can still consider whether the [C]ommittee operated under a conflict of interest"

because "[t]hough such a conflict was not found to be present in *White*, Oliver might be able to provide evidence of one." *Oliver*, 546 F.3d at 1354.

The Eleventh Circuit has declined to address the apparent tension between the decision below and *Oliver*. In *Oliver*, a participant subject to the Offset Provision filed a petition for rehearing contending that there is an intra-circuit split concerning whether this Court's decision in *Glenn* "requires consideration of conflict of interest even though benefits [from Coca-Cola's Plan] are **paid from a Trust**."[19] The *Oliver* panel recently denied the petition, which will result in the remand of the case for further development in the district court of the conflict issue, as it concerns the specific provision of the specific plan at issue in this case. Consequently, the primary issue upon which petitioners here seek review will be further developed—and perhaps clarified—within the Eleventh Circuit as a result of the *Oliver* case. A writ of certiorari is thus premature. Moreover, the current state of Eleventh Circuit law suggests that the existence of a conflict of interest as to the very Plan at issue in this case remains an open question. Although the Eleventh Circuit may eventually clarify matters further, at least the *Oliver* panel appears to view the existence of a conflict concerning Coca-Cola's Plan as an open issue. Because the premise of petitioners' request for a writ of certiorari is that the Eleventh Circuit has reached a definitive conclusion on that open issue, this Court should deny the petition.

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[19] Petition for Rehearing at 8, *Oliver v. The Coca-Cola Company*, Appeal Docket No. 05-16509-DD (11th Cir. Dec. 3, 2008) (emphasis in original).

B. This Court Does Not Grant a Writ of Certiorari to Resolve Intra-Circuit Splits.

Although the rule in the Eleventh Circuit remains unsettled, the rules of this Court for dealing with unsettled and potentially inconsistent intra-circuit law are clear. The Supreme Court does not grant certiorari to resolve intra-circuit splits. *Wisniewski v. United States*, 353 U.S. 901, 902 (1957); *cf. United States ex rel. Robinson v. Johnston*, 316 U.S. 649, 649 (1942) (identifying *en banc* review as the appropriate means of resolving intra-circuit disputes). Indeed, this Court has long recognized that "[i]t is primarily the task of a Court of Appeals to reconcile its internal difficulties." *Wisniewski*, 353 U.S. at 902.

The wisdom of this rule is well illustrated here. If the Eleventh Circuit's law concerning conflicts of interests in ERISA plans funded by irrevocable trusts were as clear as petitioners insist, the *Oliver* panel would not have remanded that case to the district court for further development of the conflict issue. But the *Oliver* panel did find such a remand necessary, even after considering the decision in this case, and the fact that one of the circuit judges (Judge Stanley F. Birch, Jr.) served on both panels suggests that the two cases can be harmonized. In any event, the Eleventh Circuit deserves an opportunity to bring clarity to this issue in future litigation.[20] If the *Oliver* case returns

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[20] Petitioners do not ask the Court to grant the petition, vacate the Eleventh Circuit's opinion in *White*, and remand the case for further proceedings in light of *Glenn*, and with good reason. *Glenn* was decided before the decision below, the existence of *Glenn* was brought to the court's attention, and the Eleventh Circuit expressly addressed *Glenn* in its opinion.

to the Eleventh Circuit after entry of final judgment, the record will have been perfected for appellate review, providing a vehicle for the Eleventh Circuit to elaborate on its view of whether the manner in which the Coca-Cola Plan is funded creates a conflict of interest. There is no reason for this Court to intervene in the current unsettled state of affairs.

II. It Would Be Premature for This Court to Revisit the Conflict Issue Less Than Nine Months After Issuing Its Decision in *Glenn*.

A. This Court Addressed Distinct, But Related, Issues in *Glenn* and the Circuits Should Have Time to Evaluate the Impact, If Any, of *Glenn* on the Issues Here.

Glenn involved an insured plan, where a third-party insurance company was granted discretion to decide disability claims and had accepted responsibility to pay benefits out of its (rather than the plan sponsor's) own assets. *Glenn*, 128 S. Ct. at 2346 ("The plan grants MetLife (as administrator) discretionary authority to determine whether an employee's claim for benefits is valid; it simultaneously provides that MetLife (as insurer) will itself pay valid benefit claims."). The Court analogized that arrangement to the situation that existed in *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101 (1989), where an employer administered its own self-funded plan—both deciding claims and paying benefits directly out of its operating assets. *See Glenn*, 128 S. Ct. at 2348 (discussing *Firestone*). *Glenn* noted that a conflict of interest is clear in both of those instances because "'every dollar provided in benefits is a dollar spent by . . . the employer; and every dollar saved . . .

is a dollar in [the employer's] pocket.'" *Id.* (quoting *Bruch v. Firestone Tire & Rubber Co.*, 828 F.2d 134, 144 (3d Cir. 1987)). When a plan is unfunded and payments are made directly from the administrator's pocket, the Court recognized that "[t]he employer's fiduciary interest may counsel in favor of granting a borderline claim while its immediate financial interest counsels to the contrary." *Id.* (emphasis added).[21] But this Court in *Glenn* had no occasion to address, let alone decide, whether this "immediate financial interest" remains where the employer has established and funded an irrevocable trust from which any benefits will be paid, with no immediate consequence to the employer's "pocket." Moreover, it is hard to imagine that the Court would have intimated a view on that distinct question without addressing the substantial circuit precedent addressed to that very issue.

Indeed, in *Glenn*, the Court dealt primarily with how to weigh a conflict of interest once it has been found to exist, not how to determine whether a conflict exists in the first instance. The Court quickly determined that, whether it is an employer or an insurance company, an ERISA plan administrator that "both determines whether an employee is eligible for benefits and pays benefits out of its own pocket" operates under a conflict of interest. *Glenn*, 128 S. Ct. at 2348. The Court then got down to determining

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[21] Indeed, a review of the full sentence of the Third Circuit's *Bruch* opinion that this Court quoted in *Glenn* is telling: "Because the plan is unfunded, every dollar provided in benefits is a dollar spent by defendant Firestone, the employer; and every dollar saved by the administrator on behalf of his employer is a dollar in Firestone's pocket." *Bruch*, 828 F.2d at 144 (emphasis added).

"how" that conflict should bear upon the amount of judicial deference given the administrator's decision, the issue that received most of the Court's analytical focus and the issue about which the members of the Court had fundamental disagreements.[22] *Glenn* simply did not provide this Court occasion to analyze the issue on which petitioners seek a writ of certiorari: whether a plan administrator that decides claims but does not pay benefits directly out of its own pocket nevertheless operates under a conflict.

B. The Circuit Courts Should Be Given an Opportunity to Determine Whether *Glenn* Impacts Their Prior Decisions Concerning Conflicts of Interest.

Despite the fact that *Glenn* focused on distinct issues, the Ninth Circuit recently interpreted *Glenn* as reinforcing its own view that a fully funded, irrevocable trust does not eliminate a plan administrator's "immediate financial interest" in denying claims and the attendant conflict of interest, and as calling into question the contrary view of other circuits. *See Burke v. Pitney Bowes Inc. Long-Term Disability Plan*, 544 F.3d 1016, 1025-26 (9th Cir. 2008) (discussing *Gilley v. Monsanto Co., Inc.*, 490 F.3d 848, 856 (11th Cir. 2007); *Vitale v. Latrobe Area Hosp.*, 420 F.3d 278, 282-83 (3d Cir. 2005); and *de Nobel v. Vitro Corp.*, 885 F.2d 1180, 1191-92 (4th Cir. 1989)). The Ninth Circuit vastly overreads the significance of

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[22] In fact, although four separate opinions were filed in *Glenn*, every member of the Court expressed agreement with the majority's reasoning and conclusion that insurance companies that both administer ERISA plans and pay benefits directly from their own pockets operate under a conflict of interest.

Glenn, but in all events the other circuits should be given more time to access the impact of *Glenn*, if any, on this discrete issue.

Petitioners rely on *Burke* to contend that there is a split of authority among the circuits concerning whether a conflict of interest exists where ERISA benefits are funded from an irrevocable trust. But petitioners are way ahead of themselves; the only disagreement that exists is that between the rule recently adopted by the Ninth Circuit in *Burke* and the views expressed in pre-*Glenn* decisions from other circuits—circuits that have not had the opportunity to revisit (or in the Eleventh Circuit's case, reconcile) the issue for themselves in light of the analysis in *Burke*. Indeed, even *Burke* makes clear that, prior to *Glenn*, the circuits had unanimously agreed "that there is no conflict of interest when plan benefits are paid out of a trust." *Burke*, 544 F.3d at 1025-26 (citing *Gilley*, 490 F.3d at 856; *Vitale*, 420 F.3d at 282-83; and *de Nobel*, 885 F.2d at 1191-92). It would be premature to conclude that there is a split of authority concerning the impact of *Glenn* at this juncture.

Other Circuits should be permitted to fully consider *Glenn*, and *Burke's* reading of *Glenn*, and decide for themselves whether *Glenn* signals a sea change in the law concerning conflicts of interest in ERISA cases that involve the payment of benefits from an irrevocable trust.[23] Eventually, circuits will either

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[23] Of course, the Eleventh Circuit below considered the impact of *Glenn* and viewed it as primarily affecting judicial review when there is a conflict, not the anterior question of whether a conflict exists. Whether that will emerge as the Eleventh Circuit's

agree with the Ninth Circuit's conclusion in *Burke* or they will conclude that the Ninth Circuit has overread *Glenn*. If the former scenario plays out, the split of authority that petitioners predict would be avoided completely. And if the latter situation occurs, then it is possible that the Ninth Circuit could reconsider its own view *en banc*. In all events, it would clearly be premature for the Court to weigh in just nine months after *Glenn* on the question of whether it enacts the major change in approach that the Ninth Circuit perceived.

III. Nor Is There Reason for This Court to Revisit the Conflict Issue Precipitously Because the Decision Below Is Correct.

Finally, there is no need for this Court to rush to revisit the conflict issue because the decision below is correct. Before *Burke*, every circuit to consider the issue had determined that the payment of ERISA benefits from an irrevocable trust removes the immediate financial interest (and hence conflict) that arises where an administrator pays claims out of its own general assets. *See Gilley*, 490 F.3d at 856; *Vitale*, 420 F.3d at 282-83; *de Nobel*, 885 F.2d at 1191-92. Although a panel of the Ninth Circuit has read *Glenn* as supporting the contrary view, that is a misreading of the decision. Indeed, as discussed above, *Glenn* involved an insurance company that paid benefits from its own pocket, not an employer that paid benefits from a trust.

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definitive view or simply a reaction to the parties below will be determined in *Oliver* or in subsequent cases.

The pre-*Burke* circuit law examining the issue uniformly and correctly recognized an important distinction between plan administrators that pay benefits from their own pocket, and those that pay benefits from a fully funded trust. For example, in *Vitale v. Latrobe Area Hospital*, the Third Circuit—in an opinion written by Judge Becker and joined by then-Judge Alito—held that an employer that administers its own ERISA plan does not operate under a conflict of interest if it funds those benefits out of a separate trust fund. *Vitale*, 420 F.3d at 283. In doing so, the *Vitale* court noted that prior Third Circuit decisions had "specifically distinguished between *insurance companies* that both administer and fund plans from *employers* who perform those roles." *Id.* at 282 (emphasis in original). That distinction was based, the *Vitale* court explained, on the fact while "[i]nsurance companies pay plan benefits out of funds that would otherwise be available as profits," employers did not necessarily do so—employers sometimes paid benefits "from a separate ERISA trust fund." *Id.* In that latter circumstance, the *Vitale* court noted that the employer, unlike the insurer, "'incurs no direct expense as a result of the allowance of benefits, nor does it benefit directly from the denial or discontinuation of benefits.'" *Id.* (citations omitted).

There is simply nothing in this Court's *Glenn* opinion, which involved the distinct context of insurance companies serving dual roles, that requires the new direction taken by the Ninth Circuit in *Burke*. Accordingly, and particularly in light of the unanimity of pre-*Glenn* circuit law, petitioners' passing reference to the alternative remedy of summary reversal is wholly misplaced.

IV. There Is Complete Agreement Among the Circuits on the Second Question Presented and This Court's Plenary Review Is Not Warranted.

The second question on which petitioners seek a writ of certiorari—whether a choice of law provision in an employee benefit plan can be enforced where its application would conflict with ERISA—does not warrant this Court's review because the circuits have unanimously and correctly rejected petitioners' position, and there is no conflict to be resolved by this Court. In this case, petitioners sought to enforce a choice of law provision in order to obtain application of the doctrine of *contra proferentem* under Georgia insurance law. (Specifically, petitioners sought conclusive application of the doctrine such that any ambiguity in an exclusion from coverage in an insurance policy makes that exclusion unenforceable as a matter of law.) But, as the Eleventh Circuit explained in its decision, petitioners' position was inconsistent with established precedent. Under well-settled Eleventh Circuit law, *contra proferentem* applies in ERISA cases, but only during the first step of the analytical framework, where the question is whether the interpretation at issue is *de novo* wrong. If so, and the plan document affords the plan administrator deference, the *de novo* wrong interpretation is still reviewed for reasonableness, but *contra proferentem* falls away, because "[t]he 'reasonable interpretation' factor and the arbitrary and capricious standard of review would have little meaning if ambiguous language in an ERISA plan were construed against the [plan administrator]." *White*, 542 F.3d at 857 (quoting *Cagle v. Bruner*, 112 F.3d 1510, 1519 (11th Cir. 1997)). Thus, the Eleventh

Circuit rejected the conclusive application of *contra proferentem* that petitioners urged because use of that doctrine beyond the first step of the analysis would conflict with the Eleventh Circuit's well-settled ERISA jurisprudence. In doing so, the Eleventh Circuit noted that, "when a federal court construes an ERISA-regulated benefits plan, the federal common law of ERISA supersedes state law." *Id.* (quoting *Buce v. Allianz Life Ins. Co.*, 247 F.3d 1133, 1142 (11th Cir. 2001)).

Despite this, petitioners contend that "the Eleventh Circuit . . . did not address what happens under federal common law when there is a choice of law provision."[24] But while the Eleventh Circuit may not have addressed the issue to petitioners' satisfaction, the issue petitioners raised had already been resolved in *Buce*, where the Eleventh Circuit held that even where an ERISA plan expressly chooses state law, that law will not be applied if its use would be "inconsistent with the language of ERISA or the policies that inform that statute and animate the common law of the statute." *Buce*, 247 F.3d at 1148. Below, the Eleventh Circuit applied that principle and recognized that the use of *contra proferentem* beyond the first step in the analysis would undermine its prior ERISA decisions.

Petitioners do not and cannot identify a circuit split as to whether a choice of law provision can be enforced where it would require conclusive application of the

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[24] Petition at 7.

doctrine of *contra proferentem* in ERISA cases.[25] That is because every circuit to examine that issue has agreed with the Eleventh Circuit. *See Morton v. Smith*, 91 F.3d 867, 871 n.1 (7th Cir. 1996) (refusing to enforce choice of law provision where doing so would result in application of the doctrine of *contra proferentem* to conclusively resolve ambiguities in an ERISA plan); *Prudential Ins. Co. of Am. v. Doe*, 140 F.3d 785, 791 (8th Cir. 1998) (same). Indeed, in *Buce* the Eleventh Circuit used these prior circuit precedents as examples of cases that "illustrate[] a circumstance in which a court found that application of a particular state law rule, even if agreed to by the parties, would not be compatible with the law of ERISA." *Buce*, 247 F.3d at 1149 n.6.

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[25] Petitioners suggest that there is a circuit split warranting this Court's review because they read the Ninth Circuit's decision in *Wang Labs., Inc. v. Kagan*, 990 F.2d 1126 (9th Cir. 1993), to hold that, unless doing so would be "unreasonable or fundamentally unfair," a choice of law provision in an ERISA plan must be enforced—even if it conflicts with the federal common law of ERISA. (Petition at 7.) But *Wang Labs* does not stand for that proposition. Indeed, although the *Wang Labs* court enforced a choice of law provision in an ERISA plan and applied Massachusetts' six-year limitations period for contact actions in a case involving claims for benefits, it did so only after recognizing that "[s]ince ERISA does not supply a statute of limitations [for benefits claims], it cannot preempt the applicable state law statute of limitations." *Wang Labs*, 990 F.2d at 1128. Thus, *Wang Labs* did not involve a situation where, like here, state law conflicted with ERISA or the federal common law applying it. Thus, the Ninth Circuit's decision in *Wang Labs* is entirely consistent with the Eleventh Circuit's precedent—both courts recognize that, even where there is a choice of law provision, state law can only be enforced where doing so does not conflict with "the language of ERISA or the policies that inform that statute and animate the common law of the statute." *Buce*, 247 F.3d at 1148.

Finally, even if *contra proferentem* were available after the first step of the analysis in this ERISA case, petitioners' claims would still fail as a matter of law. Even a cursory review of the extrinsic evidence considered by the Committee demonstrates that the Plan's Offset Provision was intended to permit offsets. The doctrine of *contra proferentem* does not come into play where an ambiguity can be resolved by extrinsic evidence. *See Natco Ltd. P'ship v. Moran Towing of Fla., Inc.*, 267 F.3d 1190, 1194 (11th Cir. 2001) (*contra proferentem* "is something of a fallback canon, and the foremost goal of contract construction is to give effect to the intent of the parties") (internal quotation and citation omitted); *Barnett v. Ameren Corp.*, 436 F.3d 830, 834 n.2 (7th Cir. 2006) (*contra proferentem* "is applied, if at all, after a contract is deemed ambiguous and after extrinsic evidence fails to cure the ambiguity") (citation omitted). Accordingly, granting a writ of certiorari on the second question would serve no practical purpose because, even if the choice of law provision is enforced and the doctrine of *contra proferentem* is applied, petitioners' claims would still be subject to dismissal on an independent basis.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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No. 08-991

IN THE
SUPREME COURT of the UNITED STATES

FRANKIE WHITE and LEON WARNER, Individually and on Behalf of All Others Similarly Situated,
Petitioners

vs.

THE COCA COLA COMPANY,
Respondent

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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PETITIONERS' REPLY TO BRIEF IN OPPOSITION

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In regards to the first question presented for review (the conflict of interest issue), Petitioners' counsel strongly disagree with Respondent's claims (i) that there is an intra-circuit conflict in the Eleventh Circuit and (ii) that the issue would benefit from further percolation.

The 11th Circuit pre and post *Glenn v. Metropolitan Life Insurance Company* ___U.S. ___, 128 S. Ct. 2343 (2008) has always taken the position that periodic contributions to an irrevocable trust eliminates a conflict of interest. See *Buckley v. Metro. Life Ins. Co.*, 115 F. 3d 936, 939 (11th Cir., 1997), *Turner v. Delta Family-Care Disability and Survivorship Plan*, 291 F. 3d 1270, 1273 (11th Cir., 2002), *Gilley v. Monsanto*, 490 F.3d 848 (11th Cir., 2007), and *Townsend v. Delta Family-Care Disability and Survivorship Plan*, 295 Fed. Appx. 971 (11th Cir., 2008).

The 11th Circuit in its remand of *Oliver v. The Coca-Cola Company*, 546 F.3d 1353 (11th Cir., 2008) recognized that *White v. The Coca-Cola Company*, 542 F.3d 848 (11th Cir., 2008) would be controlling precedent. Thus, the remaining issues (and prompting remand) in Oliver is not, as respondent suggests, evidence of an intra-circuit split.

Respondent also suggests that the other circuit courts should have an opportunity to address the conflict issue, especially since *Met Life v. Glenn* was decided less than a year ago. However, the 11th Circuit in *White* indicated that "*Glenn* does not alter

our analysis unless [the Committee] operated under a conflict of interest." *White* at 854.

Petitioners respectfully suggest not only are the circuit courts split but the circuit courts are split three ways. The 9th Circuit believes there is always some type of conflict when benefits are paid from a trust that is periodically funded. The 11th Circuit believes there is no conflict. The 3rd Circuit believes there is no conflict so long as the contributions are fixed as to amount and date of payment. Even if the other circuits weigh in on the matter, those circuits will choose either the 3rd, 9th or 11th Circuit views.

Petitioners respectfully suggest that in light of the extraordinary importance of this particular issue to so many litigants throughout the country, the views of the Solicitor General should be requested.

Respectfully submitted,

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